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T R E A T I S E
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O F
A W A R D S.

By STEWART KYD, Esq.,
BARRISTER AT LAW,
OF THE MIDDLE TEMPLE.

Fronte exile negotium.—Aggressis labor arduus.

TERENCE.

Multum magnorum virorum iudicio credo; aliquod et meo vindico.

SENEC.

L O N D O N :

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T H E A T I S E

OF THE

W A R

A W A R D S



T O

JOHN JOSEPH POWELL, ESQ.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE,

THIS ESSAY

IS

MOST RESPECTFULLY INSCRIBED,

AS A TESTIMONY

OF THE HIGH SENSE THE AUTHOR ENTERTAINS

OF THE HONOR OF

HIS FRIENDSHIP AND GOOD OPINION,

AND OF

THE JUST ESTIMATION IN WHICH HE HOLDS

HIS CHARACTER AS A LAWYER

AND A WRITER.

T O

JOHN JOSEPH POWELL, ESQ.

BARRISTER AT LAW OF THE ANGLO-INDIAN

THIS ESSAY

IS

MOST RESPECTFULLY INSERIBED

AS A TESTIMONY

OF THE HIGH REPUTATION AND ATTITUDE

OF THE HONOR OF

HIS REPUTATION AND GOOD OPINION

AND OF

THE HIGH ESTIMATION IN WHICH HE HOLDS

HIS CHARACTER AS A LAWYER

AND A WRITER.

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CHAP. VIII.

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T R E A T I S E

O N T H E

L A W O F A W A R D S.

I N T R O D U C T I O N.

IN the progress of society, a considerable time elapses, after the ideas of property, and of the exclusive rights of the individual, have arisen in the minds of men, before a compulsory system of distributive justice can be completely established. During that unsettled period, every dispute, for the decision of which the passions of the disputants do not prompt them to appeal to the chance of arms, is terminated either by a mutual agreement, the conditions of which are settled by themselves, or by the intervention of their friends; or by a reference to some indifferent person, of whose superior wisdom and equity they have formed a favourable opinion. The security which each party has for performance by the other, in the first mode of settlement, arises partly from the nature of the agreement, which consists perhaps of mutual concessions to be made at the same time, partly from the fear of mutual violence in case of refusal, and partly from that sense of honour and respect for the opinion of others, which in every period of society has a considerable influence over the mind. In the other mode, by reference, beside these principles, which are equally applicable to this as to

the first case, there is an additional security, arising from the opinion which the contending parties entertain of the justice of the arbitrator. It must soon have been found, however, that something more than all these was wanting to procure a ready and uniform obedience to the judge; and it became necessary to arm him with the collective power of the society, to enable him to enforce the execution of his decrees. Yet after the multiplied concerns, and the complicated rights of men, had rendered the science of law a distinct profession, and courts with a regular course of proceeding were established, many reasons concurred, in many cases, to induce contending parties still to have recourse to the original mode of reference, to a domestic judge chosen by their mutual consent.

UNDER whatever system of law regular courts for the distribution of justice are erected, it is found necessary, in order to give certainty to their decisions, to adapt peculiar forms of actions, and modes of pleading, to the particular nature of the case, and to establish certain formalities in the manner of bringing the parties before the court. The consideration of expence, that must necessarily be incurred before a hearing can be obtained, and a fear that a technical mistake in some part of the proceedings may endanger the party's success, often prevail with him, though satisfied of the justice of his cause, to refer it to the decision of an indifferent person, before whom he may explain every circumstance, without the apprehension of failing from ignorance of form. An action, too, can seldom decide more than a single question; but the variety of transactions, which, from the nature of improved society, must frequently have place between contending parties, requires a tribunal which can completely investigate the whole, set one claim or one injury against another, and pronounce such a sentence as will put an end at once to all their disputes. All courts have found it necessary to establish particular modes of proof, and certain rules of evidence; and one, amongst the latter, which is founded in the first principles of justice and public policy, "that no man shall be permitted to give evidence in his own cause." But this rule, like many others founded on general principles, and established for
general

general convenience, is sometimes productive of particular hardship. From the nature of the transaction itself, perhaps; from the length of time that may have elapsed since it took place; from the want of precaution in the parties to have their agreement witnessed, or reduced into writing at the time; and from many other circumstances, it may frequently happen, that either there is no other evidence than the testimony of the parties themselves, or what there is without these may be very insufficient to enable a public tribunal to draw a positive and certain conclusion. In such a case, a judge, who can examine the parties to the transaction, who can observe their looks and demeanour, and who, without being confined to the strict rules of evidence, is at liberty to decide from circumstances of probability, has manifestly a singular advantage. A conviction of the good policy of encouraging these domestic tribunals, has induced those who have presided over the formation of the civil code, to lend them their assistance to enforce obedience to their decrees: that assistance, however, is not given indiscriminately in all cases, without examining into the propriety and justice of the award; it has been thought proper to establish rules of interpretation, derived from the nature of the authority conferred upon the arbitrators, and the implied engagement under which the contending parties bind themselves by their submission: accordingly we find, that the title *Awards* makes no inconsiderable figure in almost every system of law with which we are acquainted. The rules which have been established with respect to awards, in the English law, in their general spirit and fundamental principles, bear such a resemblance to those which are found in the pandect and code of Justinian (*a*), that there can be little doubt that the latter are the source from whence the former sprung. By what slow gradations the greater number of them were first received into the Roman law, it is impossible now to discover, as they are given as acknowledged and long established rules at the time when the pandect and code were compiled: nor is it more easy to say, at what precise period they were adopted here, or whether they were admitted at once, or by degrees, as a component part

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of

(*a*) Ff. l. 4. t. 8. Cod. l. 2. t. 56.

of our judicial system. In the most ancient repositories (a) of the decisions of our courts, the greater part of them are mentioned as known and uncontroverted law. It is chiefly in the application of them to particular cases, and with respect to the manner in which effect shall be given to them, by pleading or otherwise, that they have been the subject of litigation for many centuries past.

UNDER each head into which the subject of awards naturally divides itself, it is proposed, not barely to lay down the law as it is received at the present day, but as far as the determinations of the courts on that subject, which have been preserved in the books of reports, will permit, to trace the variations of opinion which have at different periods taken place, and the grounds on which every question has been at last decided. In the execution of this plan, it may sometimes perhaps be necessary to detail a series of technical subtleties, which, some may think, might as well have been omitted: to those, however, who consider that, in every system, few laws owe their existence to legislative wisdom, contemplating the possible relations and general interests of society, and providing at once, by a positive edict, a solution for every question to which the various transactions of men with each other might in a series of ages give birth, but that by far the greatest number have been established as each particular question has arisen; that the passions of the client have a tendency to influence the mind of the advocate, and that the advocate is often ready to assist the client in repelling the claim of his opponent, by all the subtleties with which his professional pursuits have armed him—To such readers, this detail will probably appear the least faulty part of the work.

DEFINITIONS.

THAT act, by which parties refer any matter in dispute between them to the decision of a third person, is called a submission; the person to whom the reference is made, an arbitrator; when the reference is made to more than one, and provision made, that in case they shall disagree, another shall decide, that other is called

(a) Year books.

called an umpire ; the judgment pronounced by an arbitrator, or arbitrators, an award ; that by an umpire, an umpirage, or, less properly, an award. (a)

DISTRIBUTION OF THE SUBJECT.

THE most natural distribution of the subject seems to be under the following heads ;

- I. The Submission.
- II. The Parties to it.
- III. The Subject of Reference.
- IV. The Arbitrator and Umpire.
- V. The Award, or Umpirage.
- VI. The Remedy to compel Performance, when the Award or Umpirage is properly made.
- VII. The Means of procuring Relief against it when improperly made.
- VIII. And lastly, its Effect in precluding the Parties from suing on the original Cause of Action, which was the Subject of the Reference.

C H A P. I.

THE SUBMISSION.

THE Submission may be purely by the act of the parties themselves ; or it may be by their act with the interposition of a court. *How it shall be.*

IN the ancient Roman law, whether the submission was made in the one or the other of these ways, there was no complete remedy for non-performance, unless the parties bound themselves reciprocally, either to perform what should be awarded, or to incur the forfeiture of a sum of money, or of some other specific

thing (a); except in the case where the parties were mutual debtors, and they promised mutually, that he who did not obey the award should not sue for what was due to him, which was in substance the same thing as a submission under a penalty. (b)

JUSTINIAN, however, in some measure, though very inadequately, provided for the case of a submission with a simple promise to stand to the award. He enacted, that whether such a submission was verbal or in writing, then if the parties, after the award made, subscribed that the judgment did not displease them; or if, within ten days, they did not expressly declare they were dissatisfied with it, each should have a remedy against the other, in case of non-performance. (c) And where the submission was accompanied by an oath to stand to the award; or the arbitrator, by the consent of the parties, bound himself by an oath to end the

(a) Ex compromisso placet exceptionem non nasci, sed pœnæ petitionem. Ff. l. 4, t. 8, f. 2. Tametsi nominem prætor cogat arbitrium recipere—tamen ubi semel quis in se receperit arbitrium—quisquamne potest negare æquissimum fore prætorem interponere, ut officium quod in se recepit, impleat? Ait prætor, "Qui arbitrium, pecuniâ compromissâ receperit." l. 4, t. 8, f. 3, n. 1, 2.—Arbitrum autem cogendum non esse sententiam dicere, nisi compromissum intervenerit. Quod ait prætor, "Pecuniam compromissam:" accipere nos debemus, non si utrimque pœna *nummaria*, sed si et *alia* res vice pœnæ, si quis arbitri sententiæ non steterit, promissa sit. f. 11, n. 1, 2.

(b) Interdum—recte *nudo pacto* fiet compromissum: ut puta, si ambo debitores fuerunt, et pacti sunt "ne petat quod sibi debetur, qui sententiæ arbitri non steterit." 11 n. 3.

(c) Si quis presens arbitrum, sententiam dicere prohibeat, pœna committetur. Sed si pœna non fuisset

adjecta compromisso, sed simpliciter "sententiæ stari" quis promiserit: incerti versus eum foret actio. Ff. lib. 4, t. 8, f. 27, n. 6, 7.—Cum antea sancitum fuerat in arbitris eligendis; quos neque pœna compromissi vallabat, neque iudex dederat, sed nulla sententia præcedente communis electio, "ut illorum sententiæ staretur," procreabat—nihil ex eo procedere præsidii: sancimus in eos arbitros—ut eorum definitioni stetur, siquidem subscripserint,—"quod non displiceat ambabus partibus eorum sententia:" non solum reo exceptionem veluti pacti generari, sed etiam actori in factum actionem. Sin autem post sententiam minime quidem subscripserint, "se arbitri formam amplecti," sed silentio eam roboraverint et non intra decem dies proximos attestatio missa fuerit—per quam manifestum fiat definitionem non esse amplectendam; tunc silentio partium sententiam roboratam esse, et fugienti exceptionem, et agenti memoratam actionem competere. Cod. l. 2, t. 56, f. 5.

dispute

dispute with all regard to truth, the same emperor enacted, that both parties should be bound. (a)

IN the law of England, where the submission is by the bare act of the parties, without the intervention of a court, it may be either verbal or in writing: where it is merely verbal, it may be simply an agreement to submit the matters in dispute to the decision of the arbitrator, without an express promise to perform the award; it may be accompanied by such a promise, without the mention of any consideration for it; or it may be with such a promise, on a certain consideration: in all these cases, however, the effect is now the same; but the distinctions were formerly held to be material. At all times a submission, in any of the forms, was held sufficient to maintain an action on the award, if it was only for the payment of money: but if the award was of any collateral act, there was no means of compelling performance. (b) It was however held, at a very early period, that if the parties "promised" to one another, on consideration of any sum, however trifling, to perform the award, an action might be maintained on such promise, though the award was of something else than the payment of money. (c) The next step was to support an action on such an award, where the submission was by mutual promises only. (d) It was somewhat later before the

(a) Si inter actorem et reum nec non ipsum judicem fuerit consensus, ut cum sacramenti religione lis procedat, et litigatores hoc suis manibus vel per publicas personas scripserint, vel—propria voce deposuerint, quod sacramentis præstitis arbiter electus est, hoc etiam addito, "quod et ipse arbiter juramentum præstiterit super lite cum omni veritate dirimendâ—" vel si de arbitro nihil tale fuerit compositum vel scriptum, ipsæ autem partes literis manifestaverint, quod juramenti nexibus se illigaverint, ut arbitri sententiæ stetur—sive ab initio hoc fuerit ab his scriptum, vel præfato modo depositum dum arbiter eligebatur, sive post definitivam sententiam hoc scriptum inveniatur, "Quod

cum sacramenti religione ejus audientiam amplexi sunt:" vel "Quod ea quæ statuta sunt, adimplere juraverint."—Sed et si ipse solus arbiter, hoc litigatoribus poscentibus—præstiterit juramentum, "Quod cum omni veritate liti libramenta imponat."—In his omnibus casibus liceat vel in factum, vel conditionem ex lege, vel in rem utilem instituere actionem, secundum quod facti qualitas postulaverat. Cod. l. 1, t. 56, f. 4.

(b) Per Holt, 1 L. Raymond, 248.

(c) Gouldsborough, 92, pl. 4.

(d) 1 Ld. Raymond, 122. Squire v. Greville, 6 Mod. 35. 2 Ld. Raymond, 961, 965. Vid. 6 Mod. 222. 2 Ld. Raymond, 1039. 1. Salk. 76.

very act of submission was considered as implying a promise in itself to abide by the determination of the person to whom the matter was referred; and that an action might in all cases be supported on such a submission.

WHEN the submission is in writing, it is most commonly by mutual bonds, given by the parties each to the other, in a certain sum penal, on condition to be void on performance of the award; but it is not essentially necessary that they should be so given; they may be given to a third person, or even to the arbitrator himself: (*a*) and they may be given by other persons than the parties themselves, who will incur the forfeiture if the parties do not perform the award.

NOR is it necessary that, on each of the bonds, it should appear of how many persons the parties to the submission consist. Thus, where (*b*) it appeared that there were three brothers, Richard, Robert, and William; that their father had devised certain lands to the two latter, and that several disputes arising between them and Richard, they had, by bond, submitted to arbitration; Richard entering into a bond to Robert and William jointly, but they giving him separate bonds: it was held, after several arguments on an action brought by Richard against Robert, that the submission was properly made.

THE submission may also be by indenture with mutual covenants to stand to the award. (*c*)

IT is usual, in articles of copartnership, to insert a provision that all disputes arising between the partners relative to their business, or to any covenant in the articles, shall be referred to arbitration. This provision has so far the effect of a submission, that one of the partners cannot sue another either at law or in equity for any matter within the terms or meaning of the proviso, without having first had an actual reference, which has proved ineffectual, or a proposal by the plaintiff to refer, and refusal by the defendant.

(*a*) Vid. 36 H. VI. 8. 22 Ed. IV. 25 a. Owdy v. Gibbons. Comb. 100.

(*b*) Hayes v. Hayes, Cro. Car. 433.
(*c*) 2 Mod. 73.

(a) To a bill filed for discovery and relief against frauds, the defendant pleaded, that the plaintiff and he had, on the 15th of November, 1728, executed articles of copartnership, by which they had covenanted to become joint traders as Blackwell-hall factors, for eight years, and agreed that in case any difference should arise relating to their business, or with respect to any covenant in the articles, it should be referred: and averred that all matters in the plaintiff's bill related only to the partnership, and that they had never been submitted to arbitration, nor had the plaintiff ever proposed a reference, or nominated any person to be an arbitrator, though the defendant had offered and was always ready to submit all matters to arbitration.

LORD Hardwicke is reported to have disallowed the plea, not because he thought that an agreement of this kind could not be pleaded, but because there was no power in the present instance given to the arbitrators to examine the parties, as well as witnesses, upon oath. The bill was to obtain discovery and relief against frauds, impositions, and concealments, which without such a power, the arbitrators could not examine. If the plea were to be allowed as to the relief, therefore, it could not, as to the discovery, and it was beneath the dignity of the court to admit a discovery, in order to assist the arbitrators.

BUT in a late case, (b) where a similar plea was pleaded, the Master of the Rolls asserted that this opinion of Lord Hardwicke's must have been misreported, because the parties could not give the arbitrators such a power. There could be no doubt, that parties entering into an agreement that all disputes should be referred to arbitration, were bound by such agreement. If it had been actually referred, and the arbitrators had found the examination of the parties insufficient, they would have declined to determine, and then the jurisdiction of the court would have been restored; this was an answer to the objection that the plea should not go to the discovery. If it had become necessary for the information of the arbitrators, that there should be a discovery,

(a) *Wellington v. Mackintosh*. 2 Atk. 585 (569).

(b) *Kenyon*. *Halfhide v. Fenning*. 2 Brown, 336.

the bill ought to have stated that fact: the first appeal must be to those judges pointed out by the articles; if they could not determine the controversy, they would remit it to the court.

HOWEVER to render the plea valid, it must appear clearly that the subject of controversy falls within the meaning of the covenant to refer.—(a) In an indenture containing several covenants, there was a proviso that if any misunderstanding or controversy should arise in future by reason of any clause, article, or other agreement in the indenture contained, that then before any suit should be attempted, the parties should choose arbitrators for the determination of the dispute. A bond was also given for the performance of covenants contained in the indenture: the defendant being sued on this bond, pleaded this proviso, and alleged that the dispute and controversy, on which the action was brought, arose on the indenture. The court held the plea was defective, because it did not specially shew on what particular article the controversy arose, and enable them to judge whether the matter was the proper subject of reference within the meaning of the indenture. They also held, that the words of this proviso did not extend to bind the parties to submit the “breach” of every covenant or article in the indenture, but were confined to the case where a dispute arose on the “construction” of any covenant.

AND parties cannot be precluded from pursuing their right in the ordinary course, by any restriction laid upon them by another from whom they derive their title to the subject in dispute: (b) as if a testator direct, that whatever controversies shall arise on the construction of his will, they shall be decided by such and such arbitrators; the legatees, or parties claiming under the will, may, notwithstanding, have them decided at law, if they think proper.

ALL the cases of awards, reported in the books for a long series of years, appear to have been made on submissions, by one or other of these methods, by the act of the parties only; but when mercantile transactions came to be frequently the subject

(a) *Parmort v. Griffina.* 1 Leon. 37.

(b) *Dict. per Powys J.* 10 Mod. 59.

of discussion in the courts, it was soon found that a judge and a jury were very unfit to unravel a long and intricate account, and it therefore became a practice, in cases of that kind, and others which seemed to be proper for the same tribunal, to refer the matters, by consent of parties, under a rule of *nisi prius*, which was afterwards made a rule of that court out of which the record proceeded, and performance of the award was enforced by process of contempt. This practice does not appear to have begun before the reign of Charles II. for the reports of that period shew, that it was not before the latter end of that reign that the courts granted their interposition without reluctance; and in more instances than one a judge is stated to have said, that these references were but newly introduced, and he never knew any good to arise from them. But their utility was so well felt a short time afterwards, that, in the reign of William III. in imitation of them a statute (a) was made, reciting, that ‘ It had been found, by experience, that references, made by rule of court, had contributed much to the ease of the subject, in determining controversies; because the parties became thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refused submission; and “ enacting,” ‘ for promoting trade, and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters,’ “ That it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty’s courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which

“ agreement

(a) 9 and 10 W. III. c. 15, s. 1.

“ agreement being so made and inserted in their *submission* or *promise*, or *condition of their respective bonds*, shall or may, upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule of court, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court; and the court, on motion, shall issue process accordingly.”

By the words of this statute it is manifest, that the submission, and the agreement to make that submission a rule of court, may be merely verbal, though the general practice is to submit by bond.

WHEN the submission is according to the provisions of this statute, the court will compel a witness to it, to make an affidavit of it, in order to enforce the award: for though the words of the statute be not compulsory, the very nature of the thing gives the court a jurisdiction over the witness. The act of parliament has appointed only this way by affidavit, and a witness must not be permitted to evade it by his refusal: a witness to a bond is compelled, by a *subpoena*, to give evidence of the execution; and every man who subscribes his name as a witness to an instrument, undertakes, by implication, to give evidence at a proper time, and in a proper manner: no objection to this arises from the suggestion that the award was unfairly made, and that the party has no other means of preventing the submission from being made a rule of court: the hardship of a particular case must not be permitted to vary a rule founded on general principles of utility. (a)

BUT in order to found the application for a rule against the witness to make the affidavit, it seems to be necessary to lay before the

(a) *Clark v. Elwick.* 1 Str. 1, 2. 10 Mod. 332, 333.

the court some circumstance to satisfy them of the probability of his being a witness; as an affidavit of his having acknowledged that he was; or an affidavit of the party applying, that he really is so.

SUCH an application is not frequently necessary, and therefore it does not appear whether the rule granted in consequence of it may be absolute in the first instance, or must be only a rule to shew cause. The few cases that are reported have been of rules of the latter kind. (a)

It is not necessary that the agreement to make the submission a rule of court should be part of the condition, or that it should be actually signed: if it be written under the condition, and the subscription, by affidavit, appear to have been made before the execution of the bond, the court will take it to be part of the submission, as an indorsement by way of defeasance is part of a deed. (b)

If the application be on behalf of one of the parties, and it appear by the bond of the other, produced in court, that it was executed by him, the motion will be granted of course; the consent of the latter appears by the execution of the bond. (c)

A SUBMISSION was by bond, and in the end of the condition was this clause: "And if the obligor shall consent that this submission be made a rule of court, then, &c." A motion to make this submission a rule of court was opposed, on the ground that these words do not imply his consent; but that if he chose to forfeit his bond, he might prevent its being made a rule of court: the words, however, were considered by the court as a sufficient indication of consent, because they could have been inserted for no other purpose, and the motion was accordingly granted. (d)

BUT if the agreement be only that the "award" shall be made a rule of court, that is not sufficient, it is said, to ground an application to have the "submission" made a rule of court. (e)

(a) Vid. Barnes, 58.

(b) Carter v. Mansbridge. Barnes,

55.

(c) Rudd v. Coe. Barnes, 55.

(d) Baily v. Cheesely. 13 W. III.

1 Salk. 72. Comyns, 114. 1 Lord Raym. 674.

(e) 2 Barnardiston, K. B. 163. Str. 1178.

IF a cause be referred by consent at *nisi prius*, in London or Middlesex, application must be made for the order of *nisi prius*, to the clerk of *nisi prius*; if on the circuit, to the judge's associate, whose business it is to draw it up: and the attornies ought to set down the names of the witnesses proposed to be examined on the reference, on a piece of paper, and deliver it to the crier, who will swear them at the bar of the court, otherwise they must attend a judge to be sworn. (a)

It was formerly held, that the staying of a cause was necessarily implied in a reference; and even that if one of the parties to a suit said he would refer the matter to such a one, the cause must stay of course; because, says Twissden, that man is made judge. (b) But it was afterwards declared by Lord Chief Justice Holt, that all the judges of the King's Bench had made a rule, that no reference whatever of any cause depending in that court should stay the proceedings, unless it was expressed in the rule of reference to have been so agreed. (c)

THE extent of the submission may be various according to the pleasure of the parties; it may be of one particular matter only, or of many, or of every subject of litigation between them; but, what extent shall be given to the particular words of it, will be more properly discussed in another place.

It is usual, and even necessary, to fix a time within which the arbitrators shall pronounce their award; for on the one hand, a delay is necessary for instructing the arbitrators, and putting the question in a condition of being determined; and on the other the time ought to be limited, because it would not be just, that it should be in the power, either of arbitrators or of the parties, to put off the final decision for ever. (d)

THE submission, being the voluntary agreement of the parties, the words of it must be so understood as to give a reasonable construction to their meaning, and to make their intention prevail: therefore, where the submission was by deed,

(a) 1 Compton, 263. Impey, 571.
(b) 1 Mod. 24.

(c) 2 Lord Raym. 789.
(d) Domat. 1 vol. 224.

THE SUBMISSION.

rehearing that *each* of the parties was bound to the other in a sum of 100l. and they, by the same deed, granted, that "if *each* of them should stand to the award of A. B. then the obligation of him who performed the award should be void, and that of him who did not should be in full force:" and it was objected, that this submission was void, because it imported that *each* of them was bound for the performance of the award by the other. This construction was rejected as absurd and nonsensical, and contrary to the plain meaning of the parties: and it was held, that the words, "if each of them shall stand," &c. should be taken in the same sense as if the submission had been expressed thus, "that the one was bound to the other, and the other to him, each that himself should stand to the award, if not, his obligation to be in full force. (a)

So, where the condition of a bond was to stand to the award of two arbitrators, with a proviso that it should be made on or before the 23d of January; but if the arbitrators should not agree on the award, that then they should choose an indifferent man, and "they" should stand to the final end, determination and judgment, which he should give on or before the 28th of January, under his hand and seal: it was seriously argued, that the last pronoun, "they," not having immediately before it any antecedent, to which, in the grammatical order of the sentence, it could be referred, it applied to the arbitrators, who were to perform the award of the umpire; but good sense prevailed over this objection, and the court held that it should be referred to the parties themselves. (b)

WHERE the submission was to the award of four men by name, "so as the *same* award be made, and delivered up in writing by them, or any three of them:" it was not till after several solemn arguments, that the court were prevailed on unanimously to hold, that these words gave an authority to any three of the arbitrators named to make the award, the latter words being explanatory of the meaning of the parties in the former: that though in technical exactness the "same" award referred to the former part of the

(a) 39 H. 6. 9. b. 11. a.

(b) Butler v. Wigge. 2 Keb. 204. 1 Saund. 65.

sentence,

sentence, and might be taken to mean the award made by four, yet as this construction would render the latter words perfectly useless, it must be rejected, and the obvious meaning of the parties, on the whole, adopted: that the "same" award should be referred to the thing, and not to the person; so that it should be interpreted "the same" award of the same things, to be made by the said arbitrators, or any three of them. (a)

THE reader, perhaps, anticipates the observation, that a mind unacquainted with the history of legal chicane, will hardly be able to conceive that a doubt could be raised on the subject.

WHERE there is a repugnancy in the words of any part of the submission, the latter shall be rejected, and the former stand: as if the condition of a bond, dated the 16th of March, be to stand to an award, with a proviso that it be made on or before the last day of "this instant" month of "April;" here, as no month can answer to the description of this "instant month," but that in which the words are used, namely March, the words "of April" shall be rejected; for there is nothing to determine them to the next April, any more than to the April of any other year: therefore, if the award be not made till the last day of April, or indeed at any time after the last of March, it will be made at a time out of the submission, and therefore of no effect; but had it been "on or before the last day of April," without the words, "of this instant month," in order to avoid the uncertainty, it should have been taken to mean, the April of the same year. (b)

ALL kind of authority is in its nature *revocable*, though made irrevocable by express words; therefore, if one of the parties, before

the making of the award, or before the expiration of the time for making it, revoke the authority of the arbitrators, the latter cannot proceed; or if they do, the party revoking is not bound to perform their award, but may plead the revocation in bar of an action on the award itself; or he may

(a) Vid. 1 Rol. Rep. 375. Cro. Jac. 277. The cases of Sallows v. Jac. 400. Bridgeman, 91. Mo. 849. Girling, and Berrie v. Perrie.
3 Bulstr. 62. 1 Bulstr. 122, 123. (b) Sherry v. Richardson. Pop-
Brownlow, 112. Yely. 203. Cro. ham, 15, 16.

himself recover against the other, in an action for the original cause of dispute; (*b*)—and, in this respect, our law corresponds with the civil law. (*a*) But if one on one side, and two on the other, submit, one of the two cannot revoke the authority of the arbitrator without the other; for being jointly given, it must be jointly taken away. (*b*)

If the submission be merely verbal, the revocation may be so too; “I discharge you from proceeding any further,” said to the arbitrators, will be sufficient. (*d*) But if the submission was by deed, so also must the revocation be, (*e*) according to that general principle of law, that every power, authority, or obligation, must be discharged with the same solemnities with which it was constituted. (*f*)

THIS principle, however, applies only to the case of an express revocation; it does not extend to that which must necessarily be implied by construction of law, from another act of the party; for a collateral act may sometimes amount to a revocation of the authority of the arbitrators. Thus, if a woman, while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage is a revocation; because, by that, all the personal property of the wife, and a permanent interest in her real property, which would be bound by the award, vests in the husband. (*g*)

So, where a man brought an ejectment against another, to recover a mill of which the latter was in possession, the defendant suffered judgment to be entered by “nil dicit;” but afterwards they agreed to refer the question, “Who should have it,” and other matters which were in difference between them, to arbitration by bond. The plaintiff, in the ejectment, before the expiration of the time limited for making the award, sued out an “habere facias possessionem” on the judgment, and had the mill delivered

(*a*) Ff. l. 4, t. 8, f. 27.

(*b*) 5 Ed. 4. 3. b. 3 Co. 82. a. Br. Arb. 35. 21 H. 6. 30. a. 28. H. 6. 6. b. 6 H. 7. 10. 28 H. 6. 6. Fitzh. 51. a. Br. 44. b.

(*d*) Barker v. Lees. 2 Keb. 64, 79.

(*e*) 43 E. 3. 9. Fitzh. 52. b. vid. 8 Co. 80. b.

(*f*) Unumquodque dissolvitur eo ligamine quo ligatur.

(*g*) Wm. Jones; 388. 3 Keb. 9.

to him ; and on an action of debt being brought on the submission bond, it was held, that by taking away the subject of the arbitration, he had taken away the possibility of making the award. (a)

In the year books, a distinction is taken between a submission by obligation, and a submission *without* obligation. In the first case it is said, that the obligor cannot discharge the arbitrator, because he is bound to stand to his award ; but that in the latter it is otherwise. (b) Lord C. J. Coke explains this distinction in this way ; that in both cases the authority of the arbitrator may indeed be revoked ; but that where the submission is without obligation, the party revoking loses nothing ; whereas, in the other case, he forfeits the penalty of his bond : for by countermanding the authority of the arbitrators, he has not fulfilled the condition, by standing to, and abiding by their award ; and because, when a man, by his own act, renders the condition of the bond impossible, the bond becomes single, as if no condition had been annexed. (c)

THIS difference in the effect of a revocation in the two cases, was certainly good law at the time, when it was held, that no action could be maintained on an award of a collateral thing made in consequence of a parol submission ; but now that it is held, that an action may be maintained on such an award, it may reasonably be supposed the courts would also sustain an action on the case for countermanding the authority of the arbitrator. A case is reported in two books, in one of which a doubt is expressed, whether all being by parol, the plaintiff could maintain that action, or have any other remedy ; but that is evidently nothing more than a loose note of the reporter, and the pleadings are there very inaccurately stated. (d) In the other book, the case is reported at length, and the manner of the pleadings distinctly given ; the breach being assigned in a discharge by the defendant of the arbitrators from making any award ; and the judgment of the court, without much hesitation, in favour of the plaintiff.

(a) Green v. Taylor. Sir T. Jones, 134.

(b) 5 Ed. 4. 3 b.

(c) Vynior's case, 8 Co. 82. a. Brownlow 62. 2d pt. 290.

(d) Newgate v. Degelder, 18 Car. 12. 1 Sid. 281.

(e) 2 Keb. 20, 20, 24.

THE rule of the civil law is, that when the arbitrator is discharged by one of the parties, or prevented by his act from making his award, then, if a penalty was added to the submission, that penalty was forfeited; but if no penalty was added to the submission, the opposite party should have a remedy similar to our action on the case. (a)

If one of the parties first revoke the authority of the arbitrators, and afterwards request them to make an award, that will not save the forfeiture. But where the submission limits no time for the making of the award, that shall be understood to be within convenient time; and if in such a case the party request them, and they do not, a revocation afterwards will be no breach of the submission. (b)

ONE party may also revoke with consent of the other; but consent after the revocation will not save the penalty of the bond. (c)

IN the case too of a revocation, by the marriage of a feme sole, if the husband and wife submit again, the courts will not encourage the opposite party in suing for the forfeiture. (d)

THERE may be several acts done by either of the parties before the award made, which, though they cannot properly be called a revocation, yet amount to a breach of the submission. Thus, where a man submitted to pay such costs as should be stated by arbitrators chosen indifferently by the parties, it was held to be a breach in him not to have carried in his bill to the arbitrators, because he was the cause that no award was made. (e)

WHETHER the parties may revoke, when the submission is by rule of court, by consent at *nisi prius*, or in pursuance of the statute of William, it is immaterial formally to lay down. It has been seen, that, in the latter case, the courts have made the submission a rule of court, notwithstanding the opposition of the

(a) Si quis litigatorum defuerit: quia per eum factum est, quo minus arbitretur, poena committitur. Et si quis presens arbitrum sententiam dicere prohibuit, poena committitur. Sed si poena non fuisset adjecta contumpro-misso, sed simpliciter *sententia flari*

quis promiserit: incerti adversus eum foret actio.—Ff. l. 4, t. 3. f. 27.

(b) 2 Keb. 30, 30.

(c) Noble v. Harris. 3 Keb. 745.

(d) 3 Keb. 9.

(e) Baldway v. Ouston. 1 Vent,

parties ; and, in both cases, they will punish as a contempt, any act by which the arbitrators are disturbed or hindered from making their award. (a) Thus where a matter was referred by consent at *nisi prius* to the three foremen of the jury ; and before the award was made, one of the parties served the arbitrators with a subpoena out of Chancery, which hindered them proceeding to make an award ; the court held this to be a breach of the rule, and granted a rule to shew cause why an attachment should not go against him. (b)

In the civil law the better opinion seems to have been, that if the party to a submission, while the matter was before the arbitrator, appealed to the ordinary courts, he forfeited the penalty. (c)

C H A P. II.

THE PARTIES.

Who may submit. **I**T is a general rule, that every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award : but no one can, who is either under a natural or civil incapacity of contracting. (d) Therefore a married woman cannot be party to a submission, whatever may be the subject of dispute, whether arising before or after her marriage : but the husband may submit for himself and his wife. (e)

ON the principle that an infant cannot bind himself for any thing but necessities, it is clear he cannot be party to a submis-

(a) Vid. 1 Crompt. Praet. 262.

(b) *Dayila v. Almanza.* 1 Salk. 73.

(c) Si quis rem, de qua compromissum sit, in iudicium deducat : quidam dicunt, prætorem non intervenire ad cogendum arbitrum sententiam dicere : quia jam poena non potest esse, atque si solutum est compromissum,

Sed si hoc obtinuerit ; futurum est, ut in potestate ejus quem poenitet compromississe, sit compromissum eludere. Ergo adversus eum poena committenda est, lite apud judicem suo ordine peragenda. Ff. l. 4, t. 8, f. 30.

(d) Com. Dig. Arbitrament. D. 2.

(e) Sti. 351.

sion, whether the matter in dispute be an injury done to him, as for a battery committed on him, or for a trespass on his land ; (a) or an injury done by him to another. The last case, however, was not always considered as clear law ; and it has been insisted, that he might submit a trespass committed by himself, because that might be for his benefit ; and if he could not, instead of being favoured by the law, he would be in a worse condition than other men : but that reason fails ; for though it *may* be for his benefit, it may as probably be otherwise ; for the arbitrator may award a greater satisfaction than might be given in the due course of law, or the damages awarded may be increased on account of things, for which, by the law, the infant cannot be charged ; and the rule with respect to an infant is, that he cannot bind himself to any thing which, by possibility, may be to his disadvantage. It has also been said, that the infant ought to have an election, whether he will perform the award or not, and that therefore an award made, in consequence of a submission by him, is not absolutely void, but voidable only : (c) but this is contrary to the very intention of a reference to arbitrators, which is to put a final period to disputes.

AND as the infant himself cannot be bound by a submission to arbitration, so it has also been decided, that if another enter into a bond, conditioned, that an infant shall perform an award, this is also void, and the obligor could not be sued upon it. This, however, was without any argument applicable to this particular case, but only taken as an immediate conclusion, from the principle that the infant himself could not be bound. It seems, indeed, to be carrying the indulgence to an infant by much too far, and to be contrary to the analogy of law in other cases. It is in fact saying, that in all cases, where an infant cannot bind himself, no one else can be bound for him ; which cannot be pretended to be true. The infant himself indeed cannot be compelled to perform the award, neither is it in the power of his security to force him ; but it is by no means a singular thing that

(a) 10 H. 6. 14. Phbt. 51. a. 13 H. 4. 12. Dub. Rol. Arb. 2 A. 1. Rol. Arb. 2 A. 2, says cont. 10 H. 6. 14.

(c) Rudston v. Yates. March 111, 141.

a man shall forfeit his bond, though it be not in his own power to save the penalty, by performing the condition. There is, indeed, an implied exception in the case of submission to an award; that if the award itself be void, he shall not forfeit his bond by non-performance. But this exception extends only to the case where the objection appears on the award itself; and, if this be good, there appears not the shadow of a reason why the security for the infant's performance should not forfeit his bond on the infant's default, (a)

THE same point was again agitated in another case—the same argument urged in avoidance of the award: “The submission on behalf of an infant is void, the award therefore is void, depending on a void submission, and a bond for performance of a void award is necessarily void; therefore the security cannot forfeit his bond.” The same kind of answer was given as is suggested above; and though the opinions of the court are not stated in very decisive language, yet, on the whole, their inclination seemed to be, that the security forfeited his bond, if the infant did not perform the award. In this case, indeed, the action was brought by the infant, and her security, for non-performance by the other party; but as the defendant's objections were founded on the supposition that the infant was not bound to perform her part, and that therefore there would be no reciprocity, the general principle is the same, whether the security for the infant be plaintiff or defendant. (b)

THE same question was again agitated, but no decisive opinion given; because it appeared that the father had been bound for *himself* and his infant son; and it was held, that whatever might be the case with respect to the father's being bound for his *son*, yet his submission was good as to himself, and judgment was accordingly given for the plaintiff. (c)

BUT it was afterwards expressly decided, against the authority of the case (d) on which the doubt had at first been raised,

(a) Vid. Jenk. 116.

(b) Stone v. Knight. Latch 207.

(c) Bowyer v. Blookfidge, 33.

Car. 2. 3 Lev. 17. Gill v. Russell,

Hil. 1673. Freem. 61, 139.

(d) Rudston v. Yates, ante.

that the guardian may submit for the infant, and bind himself that he shall perform the award. (a)

THUS we have at length adopted the good sense of the Roman law, by which it was held, that an infant himself could not be bound by his submission; but that if he submitted by a surety, the latter forfeited the penalty in default of the infant. (b)

AN executor, or administrator, may submit a matter in dispute between another and himself, in right of his testator or intestate. Therefore, when the executor of a parson submitted to arbitration a dispute between the present incumbent and himself, as executor of the last, on account of some dilapidations of the parsonage, alledged to have been permitted by the default of the testator, and in his life, no objection was made to the want of power in the executor to submit: (c) but if the arbitrator do not give him the same measure of justice as he would be entitled to at law, the executor, or administrator, must account for the deficiency to those who are interested in the effects of the testator or intestate. (d) As, if an executor submit to arbitrament, and it be awarded, that for 70*l.* he release an obligation given to his testator in 100*l.* for performance of covenants which were broken by the obligor, the 100*l.* shall be assets, for the submission is his own act: (e) and by his submission he precludes himself from afterwards pleading to an action on the arbitration bond, that he had fully administered, and that he had no assets of the testator or intestate at the time of his submission, or since that time. (f)

So, the assignees of a bankrupt may submit to arbitration, any disputes between their bankrupt and others, provided they pursue the directions of the statute, which enacts, "that the assignee, " or assignees, of any bankrupt's estate and effects, with the consent of the major part in value of the bankrupt's creditors,

(a) *Roberts v. Newbold*, 6 W. 3. Comb. 318.

(b) Si pupillus sine tutoris auctoritate compromiserit, non est arbiter cogendus pronunciare, quia, si contra eum pronunciatur, poena non tenetur; præterquam si fidejussorem dederit, a

quo poena peti possit. Ff. l. 4, t. 8, §. 35.

(c) *Dyer*, 216. b. 217. a.

(d) Off. Exr. 229 cited Com. Dig. Administration (I. 1.)

(e) R. 3 Leon. 53.

(f) *Barry v. Rush*. 1 Term Rep. 691.

“ who shall have duly proved their debts under the commission,
 “ and who shall be present at any meeting of the said creditors,
 “ pursuant to notice to be for that purpose given in the *London*
 “ *Gazette*, to submit any difference or dispute between such af-
 “ signee or assignees; and any person or persons whatsoever,
 “ for or on account, or by reason or means of any matter, cause
 “ or thing whatsoever, relating to the bankrupt, his estate or
 “ effects, to the final end and determination of arbitrators to be
 “ chosen by the said assignee or assignees, and the major part in
 “ value of such creditors, and the party or parties with whom
 “ they shall have such difference, and to perform the award of
 “ such arbitrators—and the same shall be binding on all the cre-
 “ ditors of the bankrupt.” (a)

By virtue of the authority of this statute, the creditors present at a meeting cannot give a general power to the assignees to refer matters to arbitration according to their own discretion; there must be a particular meeting on notice for that particular purpose, in the *London Gazette*, to consider of each particular case. (b)

Who shall be bound by an Award. It is a general rule, that those only who are parties to the submission shall be bound by the award.

Thus, if a man submit, for himself and partner, all matters in difference between the partnership and another, the partner submitting shall be bound to perform the award; but the other shall not, because he is a stranger to the submission. (c)

So, if the parson on the one hand, and some of the parishioners on the other, in behalf of themselves and the rest of the inhabitants of the parish, but without the authority of the rest, submit to arbitration by bond, the parishioners submitting shall alone be answerable for a breach of the award by any of the other parishioners. (d)

So, in general, a man is bound by an award to which he submits for another (e)

(a) 5 G. 2. c. 30. s. 34.

(b) *Ex parte Whitchurch*. 1 Atk. 91.

(c) *Strangford v. Green*. 2 Mod. 228.

(d) *Mudy v. Osam*. Litt. 30.

(e) *Alsop v. Senior*. 2 Keb. 707, 718.

BUT, if a man authorize another on his behalf, to refer a dispute between the principal and another, an award made in consequence of such a submission is binding on the principal alone; and it is no objection that the agent had no interest in the subject of the dispute. (a)

WHEN there are several claimants on one side, and they all agree with the opposite party to submit the matter in dispute to arbitration, and some only of the numerous party enter into a bond to perform the award, the award shall bind the rest. Thus, where A and B, two merchants, freighters of a ship, on one side, and C and D, part owners, and all the other part owners and mariners, on the other, submitted to the award of J. S. of all matters concerning a prize taken by way of reprisal: A and B entered into a bond, and C and D into another, to perform the award; and the arbitrator awarded, that the merchants should pay to C and D, for the use of themselves and the rest of the part owners and mariners, 1000*l*. This was held to be a good award; for if A and B did *not* pay the money, the part owners and mariners might have an action of debt against them on the award, because they were all parties to the submission, though only two were obligees in the bond: and if they paid the money to C and D, to the use of them and the rest of the part owners and mariners, though the proportion that each should have was not pointed out, yet, as they had jointly submitted, the award might be to pay them jointly; and although (the award, in fact, being to pay to C and D, for their own use, and that of others) it was on that account objected, that the residue of the part owners and mariners had no remedy to have their share but by action, yet, notwithstanding that, it was held they were bound by the award: and this case was assimilated to that of an award that one party should enter into a bond to pay a sum of money to the other at a future day, which was good, though it was only a thing in action; and the rest of the part owners might have their remedy, at least, in Chancery, against C and D, as trustees for them, if not, at common law. And now that the libera-

(a) Dyer, 216. b. 217.

lity of the courts of common law has so greatly favoured the action for money had and received, there is no doubt, but that if a certain proportion of prize-money had been agreed on for each individual, before the adventure or their respective rights could be ascertained, each individual of the remaining number might maintain an action against C and D for so much money had and received to his use. (a)

WHERE there are two on one side, though they will not be bound the one for the other, yet if the award be general that they shall do one entire thing, not pointing out distinct parts to be done by each, both shall be bound to performance of the whole, and an action may be sustained against either for non-performance.

THUS, where there was a controversy concerning certain lands between A, B, and C; and A on the one part, and B and C on the other, submitted to the award of J. S. A becoming bound in an obligation to B and C in the sum of 1000l. to perform the award on his part; but B and C, unwilling to be bound the one for the other, entering into several bonds of 1000l. each to A, with several conditions: the arbitrator awarded, that A should release all his right in the land to B and C; and that, in consideration of this, B and C should pay 300l. to A. On an action of debt brought by A against B, on this bond, for non-performance of the award, and a breach assigned, that neither B nor C had paid the 300l. at the time limited by the award, it was held, that each was bound to the performance of the whole award; for they had jointly submitted, though by several obligations. (b)

BUT, in such a case, if the award had been several, certainly the one could not have been sued for non-performance, on the part of the other.

If an attorney, without the express authority of his principal, enter into a bond to a third person, under a condition to be void

(a) Wood et al. v. Thomson et al. 24 Car. B. R. Rel. Arb. F. 11.

(b) Hayes v. Hayes. H. 11 Car. B. R. Rel. Arb. E. 9. Cro. Car. 434.

on performance of the award by the principal, otherwise to be in full force, this shall bind the attorney, and not the principal. (a)

YET, it is the common understanding, that the assent of the attorney in a cause, to a reference by a rule of *nisi prius*, will bind the client: and the reason of the difference seems to be this, that in the first case the general character of attorney does not imply a commission from the principal to do any thing so much out of the ordinary course of the business of a general attorney, as to refer a matter to arbitration; but the employment as attorney in a particular suit, implies the client's assent that he may do every thing which the court may approve in the progress of the cause.

BUT it has been held in Chancery, that the assent of a solicitor to a reference by a rule of court does *not* bind the client; though in the very same case it is admitted, that in the courts of law that of the attorney does; and that if the decree be made to perform the award, and there appear in the decree only the assent of the solicitor, it is not incumbent on the plaintiff, in a bill of review for the reversal of the decree, to shew the want of assent in the principal; and that even the attendance of the solicitor, with counsel, before the arbitrator, on behalf of his client, will not bind the latter without his actual assent. (b)

It may well be doubted, however, how far the authority of this case would be recognized at present: the character of solicitor is equally known to the law as that of an attorney: their duty and their privileges are the same—the confidence reposed in them the same: they only differ in name, and practise in different courts.

If the husband submit to arbitration any thing of which he might dispose in right of his wife, the wife shall, after his death, be bound by the award. As if the husband and wife be possessed of a term in the right of the wife, as executrix of her former husband; and the present husband, and a stranger, who claims title to it, submit the interest and title of the lease to the award

(a) Bacon v. Dubarry. 1 Lord Raym. 246. 11 Mod. 329. Comb. 439. 1 Salk. 70.

(b) Colwell v. Child. 1 Rep. Ch. 104. 1 Ca. Ch. 86.

of certain persons, who award one part to the pretender, and the other to the husband and wife, the latter, after the death of the husband, shall be bound by this award. (a)

So, under a submission of all matters between a married man and another, the arbitrator may comprehend in his award a matter in dispute in the right of the wife. As if a woman be indebted to J. S. in a sum of money, as administratrix to J. D. and then marry: if the husband and J. S. submit all matters between them, an award, comprehending the debt due by the husband and wife, though in the right of the wife and as administratrix, shall bind the husband, if the wife had assets; for in that case he is chargeable by the marriage. (b)

UNDER a similar submission, an award, comprehending a debt due to the wife as executrix, will bind the wife after her husband's death, as it will the husband himself during his life. (c)

BUT where a submission by the husband respects any property of the wife, which the husband by his own act cannot alien, an award which gives that property to another, it would seem, would not be considered as binding on the wife: as if the husband, among other things, submit the right of a manor, and the arbitrators award that the husband shall give up to the other party a deed, by which an annuity is secured to the wife out of the manor; this award cannot be enforced, because the right of the husband extends only to the accruing arrears of the annuity, and not to the annuity itself. But if the submission were jointly by the husband and wife, it seems not to be questioned in the book in which this case is reported, that both the husband and wife would be bound by this award: (d) yet some doubt might be raised, from the consideration, that the only mode by which the freehold interest of the wife can be transferred, is by the solemnity of a fine. The assignees of a bankrupt, succeeding only to the right

(a) Dist. 2 El. Rol. Arb. D. 1. with a quere.

(b) Lumley v. Hutton. M. 13. Jac. B. R. M. 13. Jac. B. R. S. C. 1 Rol. Rep. 268. Rol. Arb. D. 2.

Cro. Jac. 447. Morfe v. Surry, 1 pt. Ca. Law and Eq. 212.

(c) 21 H. 7. 29. 6. cited Bridg. 91. Rol. Arb. D. 3.

(d) Vid. 21 H. 6. 19. and 1 Rol. Rep. 269.

of the bankrupt, must, it is evident, be bound by an award made before the bankruptcy, in consequence of a submission by him.

IT was formerly thought, that an action of debt could not be maintained against an administrator on an award made between the plaintiff and the intestate, even though the award was in writing; but the reason given, though often in the ancient books used as an argument to impeach an award, seems to be altogether inapplicable: it is no other than this, that the intestate might have waged his law; or, in other words, by the intervention of certain ceremonies, sworn that he did not owe the money awarded. (a)

BUT this opinion has been since over-ruled; and it has been held, that an award creates a duty, which survives to the executor or administrator, and that they shall be compelled to perform the thing awarded to be done on the part of their testator or intestate. (b)

WHETHER, by the Roman law, the representative of the deceased was bound by an award made in the life-time of his predecessor, does not appear very clearly, though the fairest interpretation of the law is, that he was. (c)

IT may safely be laid down as a general rule, that all those who would be bound by an award may take advantage of it, if made in their favour, or in the favour of those in whose right they would be bound.

THEREFORE the assignees of a bankrupt may take advantage of an award made in favour of the bankrupt before his bankruptcy.

AND for the same reason executors or administrators may take advantage of an award made in favour of their testator or intestate before his death.

(a) *Bowyer v. Garland.* Cr. El. 600.

(b) 2 W and M. *Dawney v. Veseey.* 2 Ventr. 249. Vid. 1 L. Raym. 248.

(c) *Nec utimur Labeonis sententiâ,*

qui existimavit, si arbiter aliquem, pecuniam dare jufferit, et is decesserit antequam daret, poenam committi, licet heres ejus paratus sit offerre. Fl. l. 4, t. 3, f. 27.

C H A. P. III.

THE SUBJECT OF REFERENCE.

THOUGH at all times the courts have manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection; because the subjects, on which they were made, were not the proper objects of a reference to a domestic tribunal.

It is therefore essential, distinctly to point out what subjects of controversy the law permits to be referred, and to what others it refuses that privilege. The *general* answer to this question will be best obtained, by adverting to the great principle on which every reference is made, and the obligation imposed on the arbitrator, by implication, from the nature of his duty. That answer, indeed, will not exactly apply to all the cases that may occur: some of them can only be explained by the assistance of technical reasons.

The only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is to have an amicable and easy settlement of something which in its nature is uncertain. It would be contrary to the duty of an arbitrator to do any thing that were unjust between the parties; and if the demand of the one upon the other were either certain in its original creation, or subsequently ascertained by any other means, an arbitrator would do manifest injustice were he to order, either that more should be given, or that less should be received in satisfaction. It would therefore be *nugatory* to refer that to the decision

decision of an arbitrator, in which the law, following the dictates of justice, will not permit him to make any change.

On these principles an award is of no avail, when made of debt on a bond for the payment of a sum certain, whether it be single, or with a condition to be void on the payment of a less sum, or of debt for arrears of rent ascertained by a lease, nor of covenant to pay a certain sum of money; (*a*) nor of debt on the arrears of an account taken before auditors, whether assigned by the master of the accountant, or by the court, in an action of account. (*b*) Nor of damages recovered by a judgment; (*c*) for in all these cases the demand is ascertained.

It seems to be on the same principles that a submission cannot be made of a question relative to the detention of the title deeds of an estate, nor of the demand of annuity; for, in the first case, the writings only are to be recovered; and, in the other, the annuity itself and the arrears. In some of the old books, however, reasons more technical, but less satisfactory, are assigned for these cases: that in the action of detinue of charters, neither the wager of law, nor outlawry, lies; and that it concerns land, and comprehends a warranty in itself, which is an inheritance; and that a writ of annuity is an action mixt with the realty. (*d*)

BUT an *action* of account may be submitted; for, till the account be taken, the sum remains uncertain. (*e*) So also a trespass for taking away the charters of an estate; for there uncertain damages are to be recovered for the injury of taking them away,

(*a*) 10 H. 7. 4. 4 H. 6. 17. Rol. Arb. R. 2. 5. Blake's case, 6 Co. 43, 44.

(*b*) 4 H. 6. 17. 6 H. 4. 6. 2. Fitzh. Abr. 51. a. b. Rol. Arb. R. 2. 6. f. 1. 1 Lev. 292.

At common law, before either the statute of Marlebridge or Westminster the second, there were two methods of proceeding against an accountant: one by which the party to whom he was accountable, called, in the language of those times, his master, might, by the consent of the accountant, either take the account himself,

or assign an auditor or auditors to take it, and then have his action of debt for the arrears. Or he might, in the first instance, have a writ of account, on which, after judgment *quod computet*, auditors were assigned by the court, and final judgment pronounced on their report. The report of the auditors, in both cases, was considered as matter of record.

(*c*) Gouldsb. 98, 92.

(*d*) 9 H. 6. 60. Fitzh. 51. a. Rol. Arb. V. 1. A. 6. V. 3.

(*e*) Rol. Arb. R. 4.

though

though in detinue the recovery is only of the charters themselves.

AND, in general, where the party complaining could recover by action only uncertain damages, the subject of complaint may be the object of a reference to arbitration: as any demand not ascertained by the agreement or contract of the parties, though the claimant demands a sum certain; as a *claim* of 5*l.* for different expences in the service of the other party. (*a*)

So, debt arising on a simple contract; (*b*) a demand of rent for use and occupation; (*c*) a complaint of slander; (*d*) trespass of every kind, whether personal or to the land; (*e*) and, in general, all kinds of personal wrong, where, by the policy of the state, the injury done to the individual is not considered as merged in the public crime, or where it does not include an offence against the public manners. (*f*)

THERE is also a distinction with respect to demands arising on a deed. Where the demand is wholly ascertained by the deed at the time of making it, as it is by covenant, bill or bond, to pay a sum of money; there this certain demand cannot be avoided, but by matter of as high a nature, and therefore cannot be submitted to arbitration, as has been before mentioned: but when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent, together with the deed, as in the case of a bond to perform covenants, or covenant to repair a house, there the demand being for damages for a breach may be submitted. (*g*)

ON the same principle, an action on the old statutes, for enticing away the Plaintiff's servant, might have been answered by a submission of that injury, and an award in consequence of it; because the action was not grounded merely on the statute, but also on the departure of the servant, which was matter of fact. (*b*)

(*a*) *Sower v. Bradfield.* Cro. El. 422.

(*b*) 45 Ed. 3. 16. a. b.

(*c*) 4 H. 6. 17. b. Rol. Arb. V. 3.

(*d*) 1 Keb. 848.

(*e*) 13 R. 2.

(*f*) Vid. infra.

(*g*) *Blake's case.* 6 Co. 43, 44. Cro. Jac. 99. Rol. Arb. T. 1, 2, 3, 4, 5, 6.

(*b*) Rol. Arb. S. 2. Vid. statute of labourers, 23 Ed. 3. st. 1, and the other old statutes on that subject.

MOST of those cases too, which cannot be submitted by themselves, may, when joined with other things of an uncertain nature; because then there is an uncertainty in the whole of the disputes; (*a*) as debt on a bond, whether single or with condition; (*b*) debt for arrears of rent ascertained by a lease for years; (*c*) damages recovered by verdict and judgment: (*d*)

BUT it was determined, in very early times, that the arrears of an account taken before auditors, assigned by the master of the accountant, cannot be referred even amongst other things; because, say all the justices, an award is not of so high a nature, as debt found before auditors, the latter being matter of record; (*e*) and they certainly would have said the same thing, had the case been that of debt found before auditors assigned by the court.

THE same reason, however, applies, even in a superior degree, to the case of damages recovered by verdict and judgment; for these are surely matter of record, and of as high a nature as arrears found before auditors: and, perhaps, had the latter case remained to be decided in more modern times, it would have received a different determination.

However, in all cases where the demand arises on a deed, it would seem the submission must also be by deed; because a specialty cannot be answered but by a specialty. (*f*)

THEREFORE, where A was indebted to B in 20*l.* by a single bond, and they submitted all matters between them, by parol, and it was awarded, that A should pay to B a less sum in satisfaction; it was determined, that though he had paid this smaller sum, according to the award, yet this was no discharge of the bond. But it was also held, that if the submission had been by bond, by which each bound himself to perform the award, A would have been obliged to pay the money awarded, otherwise

(*a*) Fhbt. 51. b. 6 H. 4. 6. a. b. Rol. Arb. R. 3. Tr. 22 Car. Faver v. Bates. S. C. Al. 4. Morris v. Creech. 2 Keb. 623, 659.

(*b*) Lumley v. Hutton. M. 13 Jac. B. R. H. 15 Jac. B. R. Rol. Arb. B. 8. Coxal v. Sharp. 1 Keb. 937.

(*c*) 10 H. 7. 4. Rol. Arb. R. 3.

(*d*) Gouldsb. 91, 92.

(*e*) 6 H. 4. 6. a. 4 H. 6. 17, 18. Fhbt. 51. a. b. Rol. Arb. R. 1. 6. S. 1. vid. 1 Lev. 292.

(*f*) 3 H. 4. 1. Brooke, 44. a.

he must have forfeited his bond of submission; and if he had paid it, or tendered payment, B. would also have forfeited *his* bond of submission, by bringing an action on the single bond. (a)

MUCH doubt and uncertainty seem anciently to have prevailed on the question, "How far a dispute concerning land could be referred to the decision of an arbitrator; and how far, on an actual reference, the parties were bound by his award."

THUS, we are told, in one book, (b) that "it was said by Grevill and Pollard, that land in variance, on the title, right, and possession submitted to arbitration, without other debates, and variances of other things personal, are not arbitrable, nor have the arbitrators authority to meddle with the title of real land only, but such award is void; and so a bond, with condition to obey such award, is void." The reporter, however, adds a *quere*, for that "others think clearly the contrary, if there be such words as submit title and possession; also they think," continues he, "that if I and another submit to an award of all demands, without more, in the word demands are implied all matters between us concerning the lands of both parties, which are in variance between us."

IN other places, we are told, that "arbitrators cannot make an award of freehold, and therefore cannot award the freehold of one to another." This was said by Culpepper, "which nobody denied but Skrene, who said, that an arbitrator cannot award frank-tenement without deed; but that if parties submitted themselves to arbitration by deed indented, then the award was good, and a man might plead it in bar, to which no answer was given." (c)

AGAIN, "a man cannot have a remedy to enforce an award of frank-tenement, unless he has a bond for performance." (d) "The right of freehold cannot be the subject of a reference; but the arbitrator may award, that the one party shall infeof the

(a) Lumley v. Hutton, H. 15
Jac. B. R. M. 13 Jac. B. R. Rol.
Arb. B. 8. Coxal v. Sharpe, 1 Keb.
937.

(b) Keilway, 99. b.

(c) 14 H. 4. 18, 19. Brooke, 44.
b.

(d) 9 E. 6. 26. Brooke, 53.

"other in satisfaction." (a) "An award that one shall infeof another in an acre of land, and immediately after deliver up the charters, is good." (b) But Rolle says, "that arbitrators cannot make an award of freehold, though the submission be by deed, or even by deed indented;" but his authorities (c) do not go so far.

So, he says, "that an arbitrator cannot make an award of a lease for years, as to adjudge the land of one to another, by which the interest and estate of one shall be transferred to the other, because," says he, "it is a chattel real:" from whence it might be concluded that his opinion was, that any thing in the realty could not, by any mode, be referred to arbitration. But he cites no authority, nor does he make any distinction, whether the arbitrator cannot do this at all, or only that he cannot do it unless it be within the submission.

He also lays it down for law, (d) "that there cannot be partition by an award;" but his reason seems only to extend to the manner in which the award of partition is expressed: it is, "that freehold does not pass but by livery," which was true, before the introduction of the modern forms of conveyancing; and therefore an award, in such words as these, "The one shall have one moiety of the lands in question, and the other the other moiety," would not have been effectual.

BUT it appears, by a number of cases, adjudged even while these doubts were constantly expressed, that the real difficulty was how to *enforce* an award made on a reference of a dispute concerning land; for whenever the submission was by bond, it was almost universally held, that the party who did not perform the award forfeited the bond.

THUS, it is said, "if two, by bond, submit the title of certain land to the arbitrament of a third person, who awards, that the one shall levy a fine to the other of that land, he must do it, otherwise he will forfeit his bond." (e)

(a) Dist. per Moyle, cont. per Littleton. M. 9 E. 4. 44.

(b) 18 Ed. 4. 21, cited Rol. Arb. E. II. 2.

(c) 9 E. 4. 44. 14 H. 4. 19.

(d) 1 Rol. 242. l. 16. cites P.

1 Jac. B. Horton v. Horton.

(e) Keilway, 43. a. b. 45. b.

So, "where two bound themselves in mutual obligations to stand to the award of certain persons, on the right, title, and possession of 20 acres of land; and the award was, that one of them should enter and have possession of 10 acres to him and his heirs, and that the other should have the remaining 10 acres for life:" though an objection was taken to this award, as being only of *parcel* of the things submitted, yet that was overruled, and no objection taken to the submission, as being of freehold, nor to the award on any other account. (a)

In another place, (b) it is said, "that if the condition of a bond be, that the parties shall stand to the award of J. S. concerning the *title* of certain land, and the arbitrator award, that the one shall give a release to the other of his right, and that the latter shall give to the former 20l. in lieu of it; this is a good award." And Rolle, (c) citing the same case, says that though *such* an award be void to determine the right, and to change the estate, because it is real, yet being within the submission, the party is bound to perform it."

So, where there was a submission of the title of copyhold land, and an award that one of the parties, in consideration of money paid him by the other, should release to the latter all his right in the copyhold, at a certain day; and three years afterwards make further assurance; no objection was made to the *subject* of the award, though several were made to the award itself. (d)

Yet, the idea of there being something in the nature of real property, which rendered it an improper subject of reference, continued long to be entertained: "If an award be made, says Coke, of a real thing, although that be no bar in an action for the thing, yet if this be performed, the bond is forfeited;" (e) by which, I suppose, he means, 'the bond of the party, who, notwithstanding the award, and performance by the other, sues on the original cause of action, is forfeited by his so suing; unless, it must be supposed that the word "not" is omitted

(a) 19 H. 6. 6. b.

(b) 9 E. 4. 44.

(c) Rol. Arb. B. 14.

(d) Markham v. Jennings. H. 4. Jac. B. R. Rol. Arb. K. 15.

(e) 1. Rol. Rep. 270.

“before the word “performed,” and then the meaning will be, “that the party not *performing* the award will forfeit *his* bond.”

AND so late as the time of William the third, it is observed, by one of the judges, *(a)* “that it is a question, whether the “title to land is submissible, since it is in the realty;” and he is answered by the Chief Justice, *(b)* “that things in the realty “may be submitted, as well as things in the personalty; but “that they could not be recovered on the award. *(c)*

THERE seems to be something singularly absurd in the manner in which, in many cases, this opinion of the inarbitrable nature of real property is expressed: “any thing concerning the “realty,” it is said, “cannot be referred; an arbitrator can “make no award of it; he cannot award the freehold of one “man to another;” and yet, in the next sentence, it is frequently added, “but, if there be a bond to stand to the award, “the party who does not perform it forfeits the penalty;” which is contrary to the principle which universally governs every other case on this subject; for in all other cases it is held, that if the award be void, the bond is not forfeited by non-performance. *(d)*

IN none of the books, which I have had an opportunity of consulting, is there any reason given for this opinion; perhaps the principles on which it was founded had ceased to operate before any register was kept of the proceedings of the courts; it probably had its rise from the feudal restraints on the alienation of real property: at a time when the lord had an interest in the person of his vassal, who could not be changed without his consent; when the vassal had a reciprocal restraint on the change of his lord; and when the ancestor could not disinherit his heir; it was perfectly consonant to reason, that the possessor of land should not be permitted, by a reference to an arbitrary tribunal, to infringe on these collateral rights; and when, by the removal of the restraints on alienation, the principle on which the

(a) Powell,

(b) Treby.

(c) Marks v. Marriot, 1 Lord Raym. 115.

(d) 22 H. 6. 46,

opinion was founded no longer existed, and was forgotten, the opinion itself still continued to be favoured.

In the Roman law, there is no question but that real property might be referred, and the parties bound by an award concerning it; (a) and indeed there appears to be nothing in the nature of real property itself which makes it an unfit subject of arbitration, where no adventitious reason prevails to render it so.

It may therefore safely be considered as law, that where the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it; they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might do by their own agreement: therefore, when we are told that an arbitrator cannot make an award of freehold, that he cannot award the freehold of one man to another, or that partition cannot be by an award; we are to understand these expressions to mean no more, than that land cannot be transferred, or a division made of it, by the mere magic of the words of the award; but that it is necessary that the award should order such acts to be done as would, if done by the voluntary agreement of the parties, amount to a proper transfer or partition at law.

Thus, where it appeared by the recital of an award, that the parties to the submission were joint tenants of certain land, and the award ordered that they should make partition by mutual conveyances, no objection was taken to the power of the arbitrator to order partition to be made; but to the uncertainty of the manner in which it was ordered, it not being pointed out what moiety or part the one should have, and what the other: but even this objection was over-ruled, and it was resolved, that,

(a) Inter Castellianum et Scium, controversia de finibus orta est, et arbiter electus est, ut *arbitratu ejus res terminetur*; ipse sententiam dixit, præsentibus partibus, et terminos posuit: quaesitum est, an, si ex parti Castelliani

arbitro paritum non esset, poena ex compromisso commissam? Respondi si arbitro paritum non esset in eo, quod utroque presente arbitratus esset, poenam commissam. Ff. l. 4. t. 8. §. 44.

whereas

whereas they were joint-tenants before, they would now become tenants in common. (a)

AND where the law did not require any particular solemnities, to transfer the possession from one to another, the words of the award alone have been held sufficient for that purpose; as where a controversy arose between two, concerning a lease of lands, and they submitted to the award of a third person, who awarded, that one of them should have the lands; this was held in evidence before a jury, to be a good gift of the interest of the term; but it was likewise held, that, had it been, that the one should permit the other to enjoy the term; this would not have given an interest in it. (b) And in another book, (c) where the same case is cited, and the distinction here taken recognized, it is said, that if the arbitrators award, *that the possessor shall hold the term*, it seems, that this would not bind the right of the other; for that the award does not extinguish the right there, as it does to pass the possession in the other case.— I confess I do not see any thing material in these distinctions; and I apprehend, that since the statute of frauds, (d) such an award would not be sufficient to bind the parties, but that it must order a transfer of the possession, or a release of the right, by a written instrument.

As real property cannot be transferred by the parties themselves, without deed, it seems to be a necessary consequence that, where that makes a part of the dispute, the submission, as well as the award, where the submission is by the act of the parties, must also be by deed.

It has been said, that all kinds of personal wrong may be submitted to arbitration, where, by the policy of the state, the injury done to the individual, is not considered as merged in the public crime, or where it does not include an offence against the public manners.

THIS exception was not dictated by any thing which appears in *our* books; it arose from that principle appearing in the civil

(a) Knight v. Burton. 3 Anne. 6 Mod. 231.

(b) Trusloe v. Asfewre. Cro. El. 223.

(c) Dy. 183, in marg.

(d) 29 Car. 2. c. 3. s. 1

law; but as it is founded in reason and good sense, there can be no doubt that, if the question had ever occurred in our courts, it would have received a similar determination.

As arbitrators, say the writers on the civil law, (*a*) have no power, but that which the parties can give them, we cannot submit to arbitration certain causes which the laws and good manners do not suffer to be exposed to any other event, but that which the natural authority of justice gives them, and which cannot be brought before other judges than those who are clothed with public authority. Thus we cannot submit accusations of crimes, such as murder, robbery, sacrilege, adultery, forgery, and others of the like nature; for on the one side the public interest is concerned, to have these crimes punished in a public manner; and on the other, the party accused can neither defend his honour nor his innocence but in public, and before the judges who exercise the ministry of justice; and it would be contrary to good manners, and useless for the accused, to submit voluntarily to justify his innocence before arbitrators, who having no share in the administration of justice, could neither justify nor condemn him. (*b*)

NEITHER can we, according to the same writers, submit causes which relate to the state of persons; as if the question were to know, whether a man were legitimate or a bastard—whether a gentleman or a plebeian. Nor can such causes be submitted to arbitration, the consequence of which may interest our honour or dignity in such a way, that good manners do not allow us to submit the event of them, or to choose judges for deciding them. (*c*)

(*a*) Domat. 1 vol. 225.

(*b*) Julianus indistincte scribit; si per errorem de famoso delicto ad arbitrium itum est, vel de ea re de qua publicum judicium sit constitutum, veluti de adulteriis, sicariis et similibus; vetare debet prætor, sententiam dicere, nec dare dictæ executionem. Ff. l. 4. t. 8. f. 32. w. 6.

(*c*) Domat. 1 vol. 225. De liberali causa compromisso facto, recte non compelletur arbiter sententiam dicere; quia favor libertatis est, ut majores judices habere debeat; eadem dicenda sunt, si de ingenuitate, si de libertinitate questio sit: et si ex fidei commissi causa, libertas deberi dicatur. Idem dicendum est in populari actione. Ff. l. 4. t. 8. f. 32. n. 7.

C H A P. IV.

THE ARBITRATOR AND UMPIRE.

EVERY one whom the law supposes capable *Who may be* of judging, whatever may be his character for *an Arbitrator,* integrity or wisdom, may be an arbitrator or umpire; because he is appointed by the choice of the parties themselves, and it is their folly to choose an improper person; *(a)* but a person cannot be an arbitrator, who, by nature or accident, has not discretion; as one of non-sane memory, or one who is deaf and dumb, because being deprived of the use of those senses, which are more peculiarly the medium through which knowledge is conveyed to the mind, he cannot be supposed capable of judging; nor an infant, nor a person who is under the controul of another; as a married woman, a slave among the Romans, or a villein in the times of villeinage; neither can a man attainted of treason or felony. *(b)* But with us an unmarried woman may be an arbitrix, *(c)* though by the civil law she could not, it being contrary to the proper character of the sex, according to the ideas of Justinian, to intermeddle with the office of a judge. *(d)*

(a) Com. Dig. Arbitrament. B. —parvi refert, ingenuus quis, an libertinus sit; integræ famæ quis sit arbiter, an ignominiosus. Ff. l. 4. t. 8. f. 7.

(b) Com. Dig. Arb. C. —In servum Labeo compromitti non posse scribit; et est verum. Ff. l. 4. t. 8. f. 7. Sed neque in pupillum, neque in furiosum, aut surdum aut mutum compromittetur, f. 9. —Cum lege Julia cautum sit, *Ne Minor viginti annis judicare cogatur*, nemini licere minorem viginti annis compromissarium judicem eligere: ideoque poena ex sententia ejus nullo modo committitur. Majori tamen viginti annis, si minor

viginti quinque sit, ex hac causa succurrendum, si temere auditorium receperit, multi dixerunt—f. 41.

(c) Vid. the Ducheſs of Suffolk's case. 3 E. 4. 1. Br. 37.

(d) Sancimus, mulieres, suæ pudicitiae memores et operum quæ eis natura permisit, et a quibus eas jussit abstinere, licet summæ atque optimæ opinionis constitutæ, in se arbitrium susceperint, vel si fuerint patronæ, etiam si inter libertos, suam interposuerint audientiam, ab omni judiciali agmine separari, ut ex earum electione nulla poena, nulla pacti exceptio adversus justos earum contemptores habeatur. Cod. l. 2. t. 56. f. 6.

IT is a general rule of law, founded on the first principles of natural justice, that a man cannot be judge in his own cause; and on this foundation the Roman law has expressly provided, that if a man be constituted arbitrator in a dispute to which he is himself a party, he cannot pronounce an award; adding this satisfactory reason, that he must, from the nature of the thing, either order himself to do something, or prohibit himself from asserting some claim; and that no man can either impose a command or a prohibition on himself. (a) There are, however, one or two cases mentioned in our books of reports, which seem to infringe on this principle, but which probably may admit of such a modification as to be reconcileable to it.

SERGEANT Hards took a horse as a depodand from the bailiff of the archbishop of Canterbury, for which the archbishop brought his action, and that coming to a trial at the assizes in Kent, the Serjeant offered to refer the matter to the archbishop himself, which was accordingly done by rule of court; and the Serjeant afterwards applied to the court to have the award set aside, on the principle mentioned above; but the court thought the objection of no force; probably because the reference to the archbishop was by the Serjeant's own proposal, by which they thought he ought to be bound: perhaps, too, they thought, that the principle in question applies only to the case where a man takes on himself to judge in his own cause, without the consent of the opposite party. However this may be, it is certain, that on the authority of this case, cited from recollection by one of the judges, (b) and reported by him to have been approved of by Lord Chief Justice Hale, a subsequent case received a similar decision, though the circumstances are not mentioned. (c)

ANOTHER case is reported (d) of a submission by two on each side, to several arbitrators, of whom one of the two on one side

(a) Si de re sua quis arbiter factus sit, sententiam dicere non potest: quia se facere jubeat, aut petere prohibeat; neque autem imperari sibi neque se prohibere quisquam potest. Ff. l. 4. t. 3. f. 31.

(b) Dolben J.

(c) Matthew v. Ollerton. 5 W. and M. B. R. Comb. 218. 4 Mod. 226.

(d) Hunter v. Bennison. Hardr. 43.

was one, and an objection taken to the award on that account by his partner, when made defendant to an action on the bond of submission; and the objection was supported by another observation, "That it was a principal challenge to a juror, that he had been an arbitrator between the parties in the cause:" but it does not appear that the court gave any attention to this observation; probably because they thought it inapplicable to the case in question. The circumstance of having been an arbitrator between the parties in the same cause is an objection to the juror, because he may be already prejudiced in the dispute; and the obligation under which the party was bound to stand to his award is at an end, before the cause can again be brought to trial by a jury, and does not estop him from objecting to the juror on account of a prejudice so naturally implied; but, by submitting to have his partner in the dispute one of the arbitrators, he had waived all subsequent objection, on that account, to his award.

THE Roman law recognizes two kinds of arbitrators, those who are appointed by a formal submission, and act in the capacity of a judge, and those to whom it is simply referred to set a price on any thing which is the subject of sale; to estimate the value of a rent, to decide on the quality of a piece of workmanship, to settle the shares of gain and loss between partners, or to determine any question of a nature similar to these. (a) Arbitrators of the first kind had an uncontrollable authority, from which there was no appeal, where they kept within its limits, whether their award was an equitable decision between the parties or not, and therefore the party could never be invested with that authority: but in the latter case it was considered to be the meaning and intention of the litigants, that the matter in dispute should be referred to the judgment of persons of probity and skill in the particular subject, who were not permitted to exceed the bounds of reason and equity; and if they did, their decision was

(a) Arbitrorum genera sunt duo: unum ejusmodi, ut si ve æquum sit, si ve iniquum, parere debeamus; quod observatur, cum ex *compromisso* ad arbitrum itum est: alterum ejusmodi, ut ad boni viri arbitrium redigi de-

beat, et si nominatim sit comprehensa persona, cujus arbitratus fiat; veluti cum lege locationis comprehensum est, ut opus arbitrio locatoris fiat. Ff. l. 17. t. 2. s. 76, 77.

void:

void: (a) in this case, therefore, there was no inconvenience in permitting one of the parties, by the consent of the other, to be an arbitrator of the dispute; and accordingly such a reference was frequently made. (b)

THE case of Serjeant Hards, and others of the same kind, would, in the Roman law, have been considered as more properly belonging to the latter class.

IT appears, however, to be no objection to an arbitrator, that he is related to one of the parties, or connected with him in any other way, which might raise a presumption of an inclination in his favour; for by consenting to the nomination of such a person, the other party has shewn his opinion, that such an inclination will not affect the justice of his determination. (c)

WHEN a submission is made to the award of two Umpire. or more, it is frequently thought prudent, in order to provide a remedy for the case of their finally differing, or not making an award at all, to insert a clause of agree-

(a) Ea mens est personam arbitrio substituentium, ut quia sperent eum recte arbitraturum id faciant, non quia vel immodice obligari velint. Domat. i vol. 44. Si in lege locationis comprehensum sit, ut *arbitratu domini opus adprobetur*, perinde habetur, ac si viri boni arbitrium comprehensum fuisset: idemque servatur, si alterius *cujuslibet* arbitrium comprehensum sit, nam fides bona exigit, ut arbitrium tale præstetur quale viro bono convenit. Ff. l. 19. t. 2. f. 24.

(b) Si societatem mecum coieris, ea conditione, ut *partes societatis constitueres*, ad boni viri arbitrium ea res redigenda est: et conveniens est viri boni arbitrio, ut non utique ex æquis partibus socii simus, veluti si alter plus operæ, industriæ, pecuniæ in societatem collaturus sit. Ff. l. 17. t. 2. f. 6. Societatem mecum coisti, ea conditione ut *Nerva amicus communis partes societatis constitueret*: Nerva constituit, ut tu ex triente socius esses, ego ex besse:

queris, utrum, ratum id jure societatis sit, an nihilominus ex æquis partibus socii simus? existimo autem melius te quaesitum fuisse, utrum ex his partibus socii essemus, quas is constituisset, an ex his, quas virum bonum constituere oportuisset:—arbitrium boni viri existimo sequendum esse: eo magis, quod judicium pro socio, bonæ fidei est. Unde si Nervæ arbitrium ita prævum est ut manifesta iniquitas ejus appareat corrigi potest per judicium bonæ fidei. Quid enim si Nerva constituisset, ut alter ex millesima parte, alter ex duabus millesimis socius esset: illud potest conveniens esse viri boni arbitrio, ut non utique ex æquis partibus socii simus, veluti si alter plus operæ, industriæ, gratiæ, pecuniæ, in societatem collaturus erat. Ff. l. 17. t. 2. f. 76, 78, 79, 80.

(c) Quinetiam de re patris dicitur filium familias arbitrum esse: nam et judicem eum esse posse plerisque placet. Ff. l. 4. t. 8. f. 6.

ment, that in such case the question shall be referred to the decision of a third person, who is called an umpire.

THE nomination of this person is frequently made by the parties themselves at the time of the submission; and frequently left to the discretion of the arbitrators. In the latter case, the English law differs essentially from that which was conceived to be law by the opinion most prevalent among the Roman lawyers; for though they acknowledge it to have been a common practice to refer any thing to the decision of *two* arbitrators, yet they say, that "a submission to two, with a provision, that, in case of difference in opinion, they shall nominate a third," is not valid, because they may also differ in the object of their nomination: but at the same time they admit, that in case of a submission to two without such provision, the prætor, when they can not agree in an award, ought to compel them to nominate a third person to decide between them. (a)

THE English law expresses no such anxiety for the possible difference of opinion in the choice of an umpire; and, in fact, it is more usual to appoint two arbitrators with the power of this nomination, than any greater number: but it provides, that the choice shall be fair and impartial, and that it shall not even be left to chance; therefore, where two arbitrators, having such power by the submission, did not make an award within the time limited, and could not agree in the choice of an umpire, but threw *cross* and *pyle* which of their nominees should prevail, this was thought by the Master of the Rolls a sufficient reason for setting aside the umpirage made by the successful nominee; because an election, he said, was an act of the will and understanding, but the arbitrators in this case had followed neither, but had trusted the matter to chance. (b)

(a) Si in duos fuerit sic compromissum, ut si dissentirent, tertium adsumant, puto tale compromissum non valere, nam in adsumendo possunt dissentire. Sed si ita sit, ut eis tertius adsumeretur Sempronius, valet compromissum: quoniam in adsumendo dissentire non possunt. Sed usitatum

est, etiam in duos compromitti, et debet prætor cogere arbitros, si non consentiant, tertiam certam eligere personam, cujus auctoritati pareatur. Ff. l. 4. t. 8. f. 17. n. 5, 6.

(b) Harris v. Mitchell. 2 Vern. 485.

THERE is no part of the law relative to awards, in which so much uncertainty and confusion appear in the reported cases, or on which so many contradictory judgments have been given, as on this respecting the umpire. The time when the power of the arbitrators ceases, and that of the umpire begins; the time when the umpire may be nominated, and the effect of his nomination, have, each in its turn, proved to be questions of sufficient magnitude to exercise and distract the genius of Westminster-Hall. The best way to discover some glimmering of light through this chaos of opinion will be, to consider minutely the different forms of submission by which the appointment of an umpire is regulated. It has already been observed, that he is either appointed by the express nomination of the parties at the time of the submission, or that the nomination is left to the discretion of the arbitrators. These are the leading forms, of which each has its subordinate distinctions. In each, the time limited for the umpire to make his umpirage has sometimes been the same with that limited for the arbitrators to make their award: in each, it is most usual, and seems most correct, to prolong the time beyond that period.

IN the case of a prolongation of time, when the umpire has been either appointed by the parties, or nominated by the arbitrators, in consequence of a power given them for that purpose in the submission, the authority of the latter is determined, and that of the former immediately begins on the expiration of the time allowed to the latter. Thus, if the submission be to certain arbitrators, and if they *cannot* agree, or be not ready to deliver the award, in writing, before the first of May, it be provided, that then J. S. shall be umpire, and make his umpirage by a certain day after; though the arbitrators never *speak* of the matter, so that there can be no *disagreement* between them, yet, if they make no award before the first of May, the umpire has authority, by this submission, to make his umpirage; for the words, "if they *cannot* agree," are not to be taken literally, but in the same sense as "if they *do* not agree," or "if they make no award." (a)

(a) Lumley v. Hutton, on Demurren. H. 15 Jac. B. R. Rol. Arb. P. 1.

BUT the point on which, in all the forms of submission, the greatest difficulty has been felt, has been, to decide whether any conduct of the arbitrators, before the expiration of the time limited for their making their award, can authorise the umpire to make his umpirage *before* the expiration of that time.

THE condition of a bond was, to stand to the award of J. S. and J. D. so as the award were made and delivered on the next day; and if they could not *then* agree, then to stand to the umpirage of J. N. so that he made and delivered his umpirage on the next day, or the day after that. On the argument of this case, we are told, (a) that Rolle held, and delivered, that if it had been alledged, that the arbitrators, before the expiration of the next day, had refused to determine, and had deserted their power, that would have enabled the umpire to make his umpirage on the next day, the time limited for the arbitrators. But the judge, who cites this opinion, does it with disapprobation; and observes, that Rolle must himself have altered his opinion, because he reports his own judgment otherwise; which he certainly does, for he says, "that in such a case, though it be alledged that the arbitrators could not agree on any award, and that they had altogether refused and neglected to make any award, yet the umpire cannot make his umpirage the next day; for that though the arbitrators could not agree at any time of the day, and neglected and refused to make an award, yet at *any* time after, during the day, they *might* have made an award; because the words, "if they cannot *then* agree," imply, that they have to the last moment of the day, and it is a condition precedent to the power of the umpire extending to the whole day, and no act of the arbitrators can hasten it beyond the power; and if both the arbitrator and the umpire had power at the same time, both might make awards, and it could not be decided which should prevail. (b)

ACCORDING to this opinion, if in such a case no further time had been given to the umpire, his appointment would have been void. And accordingly, where the submission was "to the

(a) Pr. Twisden. 1 Mod. 275.

(b) Barnard v. King, on demurrer. Rol. Arb. P. 6.

award of certain arbitrators, and if they *disagree*, then to the umpirage of J. S. so that the award or umpirage were made *before* the first of May;" in this case it was held, that the umpire could make no award, 'till a final disagreement between the arbitrators, and that, as they had time to make their award, 'till any time before the day, there was no time given to the umpire, who therefore could make no award. (a)

FROM these cases and others (b) under similar circumstances, decided on the authority of these, it appears evidently to have been the opinion of the courts in those times that, where the umpire was named in the submission, if no further time was given to him than to the arbitrators, his nomination was a mere nullity, and he could, under no circumstances, make an award; and that, where there was a prolongation of time, he could not interfere before the expiration of that allowed to the arbitrators. —It was not long, however, before this opinion began to be doubted; a submission was to arbitrators, with a proviso, "that their award should be made on or before the 29th of July; otherwise to an umpire, provided he should make his umpirage before the 2d of August." The arbitrators refusing to make an award, the umpire made his umpirage on the 29th of July; and though the court held that, in this case, the umpire could not make an award on that day, because 'till the expiration of it the authority of the arbitrators still subsisted; yet Chief Justice Keeling said, hypothetically, that had the submission been to A, "provided he made his award on before the first of May; but if he declined it, then to B, as umpire, provided he should make his umpirage the *same* day;" an umpirage made on that day would have been good, on an averment of refusal by the arbitrator. (c)

AND in that report of one of the former cases, (d) which seems to be the fullest and most accurate, the judgment of the majority of the court is said to have proceeded rather on the

(a) Barber v. Giles. Rol. Arb. P. 2. S. P. 2 Vern. 100.

(b) Copping v. Hurnard. 1 Sid. 428, 454. Sr. T. Raym. 187. 2 Keb. 462, 619. 2 Saund. 132.

(c) Lush v. Crabbe. 19 and 20. Car. 2. 2 Keb. 263, 332.

(d) Copping v. Herauld, or Hurnard. 2 Saund. 129.

defective manner of pleading, than on any decided opinion of the umpire, having acted without authority.—The submission was to the award of two, provided it should be made before Michaelmas, and if they could not agree then to the umpirage of a third, who should decide within the same time. The plaintiff declared, that the arbitrators made no award, but that the umpire had made an umpirage, which was set forth; but because it appeared to have been made within the time appointed by the arbitrators, judgment was given for the defendant, after a consideration of two or three terms; and the principal reason was, that the averment in the declaration, “that the arbitrators did not, nor could make any award,” was not sufficient, and that, tho’ the arbitrators had not at the time of the umpirage made any award, yet they might have done it afterwards; and therefore the umpire had acted before it came to his turn; that the averment, that the arbitrators could not make any award, was idle, for nothing appeared to the court against the possibility of their making an award, if they had been willing; but that, had any fact been laid before the court, from which it must necessarily have appeared that the arbitrators could make no award, as if it had been shewn that one of them was dead, it might have been otherwise; and the whole court, except Twisden, were of opinion, that, if it had been averred that the arbitrators had disagreed as to the terms of their award, and had declared they would intermeddle no further with the subject, the umpire might have proceeded within the time.

AND in a subsequent case, (*a*) the opinion was totally overruled, and those cases which proceeded on it denied to be law; the reason on which it was founded being considered as unsatisfactory: for it was said, if the arbitrators did in fact make an award within the time allowed to them, that should be considered as the real award; and if they made none, then the umpirage should take place: and there was no confusion as to the concurrence of authority with respect to the time. The umpire had no concurrence absolutely, but only conditionally if the ar-

a/ Chafe v. Dare. P. 33. Car. 2. Sir T. Jones 168.

bitrators made no award within their time.—This was meant to apply equally to the case where the umpire was confined to the same time with the arbitrators, and to that where a further time was given to him.

WHERE the nomination of the umpire is left to the arbitrators, it seems (a) anciently to have been the prevailing opinion, that they could not proceed to this nomination before the last moment of the day when their own authority expired. While that opinion prevailed, unquestionably the power given them in the submission, to nominate an umpire, when the latter was expressly limited to the same time, must have been a mere nullity; and where further time was given him, an award could not possibly be made by him before the expiration of the time allowed the arbitrators, and therefore no question could be raised on the subject.—This opinion however was relinquished about the time of James the first; and a nomination of an umpire before the expiration of the time allowed to the arbitrators, was first supported in favour of those submissions where no additional time was given to the umpire; therefore where the submission was to two, with this clause, "Nevertheless if they do not end it within ten days, they shall nominate another, who shall end it within the ten days," it was held, that if they thought they could not agree within the ten days, they might appoint another, who might make an umpirage *within* the ten days. (b)

THE same indulgence was afterwards extended to the case, where further time was given to the umpire, as to the power of the arbitrators to nominate him before the expiration of their own time: thus, where A and B submitted to the award of J. S. provided his award should be made on or before the last day of May next ensuing; and if he made no award on or before that day, then they should stand to the award of such person as should be nominated by J. S. to be made before the tenth of June after: the arbitrator, on the last day of May, nominated an umpire, who made an award before the tenth of June, and this

(a) Vid. the cases cited *infra*.

(b) *Fyall v. Varier*. M. 11. Jac. 174. cited 1 *Ld. Raym.* 671. 12 *Mod.* B. *Godbolt*. 241 *Roll. Arb. P.* 3.—

S. P. Twisleton v. Travers. 1 *Lev.*

312.

was held to be good; though it was objected, that the arbitrator had the whole of the first day of May to make his award in; (a) but the reason given for the determination in these cases is, that by the nomination of an umpire, the authority of the arbitrators is at an end, and that the reason which induced them to make the nomination, might be, that they felt themselves unable to make an award within the time.—The judgment in this case has been since confirmed by similar resolutions; but the reason is something different, being merely, that the arbitrators having made no award within the time, the umpirage shall be good. (b)

SOMETIME before this last case, occurred that of Jennings and Vandeput, of which the circumstances were these: (c) The submission was to the award of four merchants, provided it should be made and delivered in writing, before the twentieth of July following; and if they could not agree, then to the award of such an umpire as they should name, provided he made his umpirage in writing before the twenty-fifth of July following. The arbitrators made no award, on or before the 20th of July; but three of them, on the 18th, by their writing dated on that day, nominated an umpire, who took the charge upon him, and the fourth agreed to this nomination on the 21st.—The umpire made his umpirage before the 25th, according to the proviso in the submission: an action being brought on the award, and a verdict given for the plaintiff, it was moved in arrest of judgment, that the nomination of the umpire, before the 20th of July, was void; for that the arbitrators had the whole 20th day in which to make their award, and that they could not nominate an umpire till afterwards; but the objection was overruled, because there was no complete nomination until the agreement of the fourth arbitrator with the other three, and the writing was not to have effect till that time. But it was also observed, that if the nomination of the umpire had been complete, be-

(a) *Watson v. Clement.* M. 24
Car. B. R. Rol. Arb. P. 5.

(b) *Elliot v. Cheval.* Lutw. 541,
544. Tr. 11 W. 3.
(c) *Cro. Car.* 263. T. 3. Car.

fore the expiration of the time for making their award, yet it would have been good, as no award was made by them within the time.

On the authority of this latter observation, Twisden J. held (a) that where the arbitrators have authority to nominate an umpire, they may do it before the expiration of the time for making their award, and that such nomination does not extinguish their authority. But, at the same time, he seems to have considered it as a necessary consequence of the continuance of their authority, that the umpire has no power to interfere, notwithstanding any refusal of the arbitrators to decide the question, till the time allowed to them be expired: and he went so far as to affect, that if such a power were given to the umpire by the submission, it was void in its construction, for the same reason as had been given in some of the preceding cases, "that two could not have a several jurisdiction at the same time; and that the arbitrators, though they had once declined their office, might resume it whenever they pleased within their time."

In the case before the court, the condition of a bond was to stand to the award of two, who were to make their award on or before the nineteenth of February, with a proviso in these words, "and if they do not make an award *before* the nineteenth of February, then I empower them to choose an umpire; and by these presents bind myself to perform his award." The umpire chosen according to this power made his umpirage on the nineteenth of February, and the other judges then present (b) assenting to the principles laid down by Twisden, concurred with him in deciding, that the umpirage was void.

HOWEVER, notwithstanding this case of Twisden's, the idea still continued for a considerable time, that by electing an umpire, before the expiration of their own time, the arbitrators gave up their authority to make an award.—The following case occurred late in the reign of William the third: (c) A sub-

(a) In *Delaval v. Maschall*. 29 Car. 2. 1 Mod. 274. Sr. T. Raym. 205. 1 Lev. 285. there called Denovan v. Maschall.

(b) *Rainsford and Morton*.

(c) *Mitchel v. Harris*. 13 W. 3. 1 Salk. 71. 1 Ld. Raym. 671. 12 Mod. 512.

mission was "to stand to the award of two, provided it should be made on or before the twenty-ninth of June, and if they made no award, then to the umpirage of such person as they should choose," without limiting any time for the umpirage. The arbitrators chose an umpire on the 29th of June, who then made his award: it was objected, in the terms of former cases, that the arbitrators had chosen the umpire too soon, because they had chosen him before the determination of their own authority, they having the whole of the day, in which they might make their award; and that, notwithstanding their having chosen an umpire, they might still make an award, before the expiration of the time allowed to them.

BUT it was answered and resolved, by the Chief Justice, with the concurrence of the rest of the court, that by the submission, the arbitrators had an election to make an award, or to choose an umpire by such a day, and that by doing the latter they had determined their election, and, together with that, their authority. But he distinguished between this case, and that where the umpire is named in the submission; for that, in the latter, the umpire could not make an award before the expiration of the time allowed to the arbitrators.

AND it is said to have been settled in the Common Pleas, so late as the eighth of George the second, that arbitrators cannot proceed on a reference, after they have once named an umpire, for that then their authority ceases, though the time for making their award be not expired. (a)

IT is now however finally determined, that arbitrators may nominate an umpire before they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority, that it is the fairest way of choosing an umpire. (b) And it is in fact not unusual for the parties to make it a condition in the submission that the umpire shall be chosen by the arbitrators, before they do any other act.

(a) Rep. Pract. in C. B. 116. Pasch. 3 G. 2. *Danes v. Monlay* cited Vin. Abr. Arbit. P. 18.

(b) 2 Term Rep. 645.

THEY may also, when a further day is given to the umpire, and the choice left to them in general terms, choose him at any time *after* the expiration of their own time, provided it be before the time limited for him. (a)

CONSIDERING the intention of the parties, as the proper criterion on this subject, independently of decided cases, there does not appear the semblance of a reason, why, in the case where no further time is given to the umpire than to the arbitrators, an umpirage made before the expiration of that time, should not be supported, whether the umpire be named in the submission, or the choice of him be left to the arbitrators: it seems to be acting against the very policy of the law, in recognizing these domestic jurisdictions, to consider that as nugatory which the parties have manifestly shewn to be their intention, unless that intention be contrary to some established maxim of law plainly applicable to the subject, or repugnant to common sense: what maxim of law is contradicted by a wish in the parties to have a dispute decided within a certain limited time, either by two, or by a third, in case of a failure by the two, it is difficult to discover; and that such a thing is repugnant to common sense it will hardly be asserted.

THE conclusion from the whole of the cases taken together, seems to be in favour of such a submission, and of an umpirage made according to it.

WHILE the opinion prevailed that, by nominating an umpire the arbitrators renounced their office, and could not afterwards make an award, there was some foundation for a distinction between the case of an umpire expressly named in the submission, and that where his nomination was left to the arbitrators, when a further time was given to the former beyond that which was limited to the latter.—In the second case there could be no apprehension from that concurrence of authority so much dreaded in the first, and no inconvenience could arise from supporting an umpirage made before the expiration of the time allowed to the arbitrators; but now that that opinion is exploded,

(a) *Burdet v. Harris.* 3. Keb. 387. *Freem.* 378. *Adams v. Adams.* 3 Mod. 169.

the distinction which was founded on it necessarily fails; that which is law in the one case must be considered as law in the other. It has been seen, that in the case where the umpire is expressly named in the submission, the old opinion, that the umpire could not make an umpirage before the expiration of the time allowed the arbitrators, was over-ruled, by the case of *Chafe and Dare*: that case, though not always attended to in the subsequent cases, has not been directly contradicted; but the general current of decisions, since that time, has rather tended to confirm it. There does not appear any direct authority that, where the nomination of an umpire is left to the arbitrators, and a further time given him, he may, when nominated before the expiration of that time, make his umpirage within it. But there is a case which shews, that, had that question been decided, it would probably have been decided that he might.

THE plaintiff and defendant had, in the beginning of December, entered into bonds of arbitration, with a proviso, that the arbitrators should make their award by the 17th of January following; and if they should not, then the parties bound themselves to stand to the umpirage of such person as the arbitrators should indifferently choose, provided it should be made by the first of February. They chose an umpire on the 24th of December, who made his umpirage on the 14th of January. The counsel for the defendant, who impeached the umpirage, confessed, that a case between *Ogel and Cogdel*, which in circumstances exactly resembled this, had been lately decided in the Common Pleas, and that the court had shewn an inclination to consider the umpirage as binding; but he said, that the judgment of the court had proceeded on another point. Not depending much on this circumstance, however, he took an exception to the form of the affidavit on which the application was founded for enforcing the award: the court thought the exception fatal, and therefore said they did not think it necessary to declare any final opinion on the point of law; yet, they said, they had not much doubt but the umpirage might be maintained. (a)

(a) *Cowel v. Waller*. Trin. 5 Geo. 2. 2 Barnard. K. B. 154.

UPON the whole, there seems to be little reason to doubt, that in all cases where an umpire is introduced into the submission, whether he be there expressly named, or his nomination be left to the arbitrators; whether the time allowed to him be the same with that allowed to them, or extend beyond it, he may, unless in the latter case restrained by express words, or by plain implication, make his umpirage before the expiration of the time allowed to the arbitrators.

THE only remaining question on this point is, whether, in an action, or on a summary application to enforce this umpirage, it must not be shewn expressly to the court, that the arbitrators, before the umpire actually undertook the business, neglected, or refused to proceed, or expressly renounced their authority: unless this was in fact the case, it is manifest the umpire could not take upon himself to decide, the meaning of the parties being clearly to have recourse to an umpire, only in case of default in the arbitrators. But it would seem, that the very circumstance of no award having been made by the arbitrators within their time, is a foundation for presumption, that they had actually declined making a decision on the subject, and that therefore an allegation, that they had in fact made no award, is sufficient. And this opinion is apparently justified by the terms in which the judgment of the court is given, in the case of Chase and Dare, the leading case on this point.

FROM the opinion, that the arbitrators, having once elected an umpire, had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business, they could not elect another. In the case of Trippet and Eyre, (*a*) which occurred in the Common Pleas, in the first of William and Mary, this opinion was strenuously maintained by the Chief Justice, (*b*) in opposition to the rest of the court, who supported the contrary position. The reasons on which he founded his opinion were these: first, he said, the nature of an authority was such, that, when once executed, it was determined, and the parties to whom it was given

(*a*) Trippet v. Eyre. 1 W. and M. in C. B. 3 Lev. 263. 2 Vent. 113.

(*b*) Pollexfen.

had no further power: the arbitrators, therefore, having once named an umpire, could not name another, though the first refused; because, secondly, the person first named, though he had refused, might still have proceeded if he had pleased; for no case could be put of a man, vested with a bare authority, being concluded, by his refusal, from afterwards executing it; and therefore, if the second were to be considered as well nominated, there would be a concurrence of authority in several persons to make an award, which, on the authority of the old cases of Barnard and King, and Barber and Giles, he said the law would not permit.

THESE arguments were answered by the other three judges in this manner: that they were to consider the penning of the condition of the bond, which was, "to stand to the award of such umpire as the arbitrators should nominate," which could not be confined to the circumstance of barely naming a man, but must be taken to be an effectual nomination, by the person named accepting of the office; and his refusal made it amount to no more than a bare proposal to him, which did not conclude the arbitrators from naming another. It was true, that an authority, once fully executed, was determined, and could not be executed again; but the condition to stand to the award of such person as the arbitrators should name, could not, they said, be with propriety called an authority; the terms imported rather a description or qualification of the person who was to make the award, than an authority conferred on the arbitrators; yet, admitting the condition to amount to an authority, there was here no complete execution; and if the person authorised make a void, or ineffectual execution of his authority, he may execute it again. If a letter of attorney were to deliver seisin, and the attorney delivered it within the view, which was not a good execution of his authority, that would not conclude him from delivering seisin afterwards upon the land: a writ of possession was executed by the sheriff in delivering possession of a house, and afterwards it was discovered, that a person was hidden in a room of the house, on which he was turned out, and the sheriff delivered possession again,

again, which was resolved to be well. (a) It could never be the meaning of the parties, that if the arbitrators named a man who refused to take upon him the office of umpire, they should be concluded from naming another.

WITH respect to the opinion, that the person first named might afterwards have taken upon him the umpirage, notwithstanding his refusal, it might be answered, that admitting that to have been the case, if he had done it before the effectual nomination of another, yet it was clear he could not have accepted the office of umpire, after such effectual nomination: a second nomination took away the effect of the first; and if, before they had named another, the first had taken on himself the office, that would have prevented them from proceeding to a second nomination, and therefore there could be no concurrence of authority. As to the cases cited by the Chief Justice, relative to this latter point, these were cases, in which the umpire was named in the submission, and therefore could not apply to the present; and had, besides, been expressly over-ruled by that of Chase and Dare. But, where the nomination was left to the arbitrators, without further time given to the umpire, it had been decided, according to the best report of the case, (b) that, on an allegation that the arbitrators *refused* to make any award, the umpirage would have been good—On these grounds judgment was given for the plaintiff—Yet, notwithstanding the good sense apparent in the reasoning of the three justices, Lord Chief Justice Holt held, not long after, that having once chosen an umpire, the arbitrators had executed their authority, and therefore could not choose another, though the first refused, unless the nomination was under a condition that he should accept, for then he was no umpire 'till the condition was fulfilled: but Justice Rokeby doubted the soundness of this distinction; because, he said, every election implied a condition that the office should be accepted. (c) Is it necessary to add, that good sense, on the present question, is at variance

(a) Palm. 289.

(b) Copping v. Horner. 2 Saund. 119.

(c) Reynolds v. Gray. 9 Will. 3. 1 Salk. 70. 1 Ld. Raym. 222. 11 Mod. 120.

with the opinion of the two Chief Justices? That the selfishness of parties, and their desire to defer the payment of a just demand, should prompt them to bring such a question before a court, is not surprising; the wonder is, that grave and learned judges should be able to persuade themselves that there was any ground for raising it.

WHEN the person to whom the parties have agreed to refer the matters in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties, or to their attorneys: if the submission be by rule of reference at *nisi prius*, the respective attorneys should set down the names of the witnesses proposed to be examined before the arbitrator on a piece of paper, and deliver it to the crier, who will swear them at the bar of the court: the parties also, if that be part of the rule, must be likewise sworn; but if this precaution be neglected, both witnesses and parties must be sworn before a judge. It is usual for the plaintiff's attorney to obtain the order of reference from the associate or clerk at *nisi prius*, and attend the reference to have an appointment; and that being obtained, to subscribe it to a copy of the order of reference, and serve it on the defendant or his attorney: but if he fail in these respects, the defendant's attorney may take the same steps which he ought to have done: and this frequently becomes necessary, when the plaintiff, by the circumstances appearing at the trial, begins to apprehend that the matter may go against him.

THE parties must attend according to the appointment, either in person or by attorney, with such witnesses, and such documents, as they may think necessary to substantiate their respective claims. The arbitrator is then to examine those witnesses and documents, as far as he may find such examination necessary or proper, to enable him to form a decided opinion on the merits of the case: he may also examine the parties themselves, or either of them, if he see good reason for so doing; or he may call for any other information he may judge necessary.

IF the matter be long or intricate, or if he cannot satisfy him-
self

self with respect to the decision he ought to give, he may adjourn the matter from time to time, giving notice, as at first, of the time and place of every subsequent meeting ; (a) provided, that when a time is limited in the submission, he make his award within that time.—Where no time is limited, he may, by the English law, take what time he pleases, unless either of the parties specially request him to make an award within a reasonable time, and, in case of refusal, revoke his submission ; for the parties will not be bound by an award, after such revocation. (b) Where a time is limited, he cannot make an award after that time, unless it be prolonged. When the submission is by the act of the parties, without the intervention of a court, that prolongation can only be by their mutual consent. If the submission was by bond, conditioned to be made a rule of court, according to the statute, or by reference at *nisi prius* ; the submission, or the rule of reference, must first be made a rule of court ; and then, if the parties consent to have the time enlarged, the court will grant leave for the enlargement, as of course : when it is not suspected by the party who undertakes to make the application, that there will be any opposition from the other, it is sufficient to give notice to him of his intention ; and, on an affidavit of that notice, the court will grant the rule ; at least, if the other party consent by counsel, as is usually the case.—But if any opposition be apprehended, the best way of proceeding for the party who wishes to enlarge the time, will be to apply, on an affidavit, stating the circumstances on which he conceives the time ought to be enlarged, for a rule on the other party, calling on him to shew cause why it should not : if the rule be ultimately granted, the party, on whose motion it was, must have it drawn up with the proper officer, and serve a copy of it on the arbitrator ; and, on procuring from him an appointment of another time for hearing the parties, serve the rule, with a copy of the appointment on it, on the opposite side.

In the Roman law, it was not unusual, for a clause to be in-

(a) *Diem proferre vel presens, vel per nuncium, vel per epistolam potest*, Ff. l. 4. t. 8. s. 27.

(b) *Vid. ante page 19.*

ferted in the submission, giving the arbitrator a power, in case of necessity, to prolong the time ; and then he might do it without a new authority from the parties ; but where no such clause was inserted he could not do it without their consent. (a) The provisions of that law however were such, that it was not in the power of the arbitrator, from negligence or design, to deprive the parties of the benefit intended by their submission, by an unnecessary and unreasonable delay ; for every man who took upon himself the office of arbitrator, might in general be compelled by the prætor to decide between the parties within a reasonable time ; unless he was some superior magistrate actually in office, or unless he could shew some satisfactory reason why he ought not to be compelled : as if he would swear that he had not yet been able to form a decisive opinion on the subject ; that he had been defamed by the parties ; or that a mortal enmity had arisen between himself and them, or one of them ; or that he was prevented by the infirmities of age ; or by ill health since he had undertaken the office ; or that he was prevented by the pressure of his own affairs, or his necessary attendance on the duties of some public employment : if no time was limited by the submission, he might at any time be compelled to fix a day, by the consent of the parties, for taking the matter into consideration. — If he excused himself on account of attendance on public duty, his excuse would have been admitted, if there was no clause in the submission empowering him to prolong the time ; but if there was, then he might be compelled to prolong it. And even if

(a) Si arbiter, cum in compromisso cautum esset—ut posset diem proferre, diem protulit, Labeo ait, valere prolationem.—Hæc autem clausula, *diem compromissi proferre* nullam aliam dat arbitro facultatem, quam diem prorogandi: et ideo conditionem primi compromissi neque minuere, neque immutare potest. Ff. l. 4. t. 8. f. 25. —Arbiter ita sumptus ex compromisso, ut et diem proferre possit, hoc quidem facere potest: referre autem contradicentibus litigatoribus non potest. §. 33. —Arbiter ex compromisso sump-

tus, cum ante eum diem, qui constitutus compromisso erat, sententiam dicere non posset, diem compromissi proferri jusserat; alter ex litigatoribus dicto audiens non fuerat: consultebatur, possetne ab eo pecunia ex compromisso peti? Respondi non posse: ideo quod non esset arbitro compromissum, ut id haberet. S. 50. —Arbiter nihil extra compromissum facere potest et ideo necessarium est adjici de die compromissi proferendâ. Cæterum impune jubenti non parebitur. §. 32. n. 21.

there

there was no clause of that kind, yet if the time limited was nearly expired, and the parties agreed to continue their submission to him, he could not otherwise be excused, on account of a public office, than by consenting to decide under a fresh submission.—If the time was expired, without any award made, and the parties again agreed to refer the matter to the same person, then, if he could not shew, that it was not owing to any default of his, that the matter was not decided, he was obliged to undertake it anew; if he could, he was of course excused. (a)

THE English law has made no similar provisions against the neglect of duty in the arbitrator; but it has secured each of the parties against the voluntary procrastination of the other, by permitting the arbitrator, on due notice given, to proceed with-

(a) Et quidem arbitrum cujuscunque dignitatis, Prætor coget officio, quod suscepit, perfungi: etiamsi sit consularis: nisi forte sit in aliquo magistratu positus, vel potestate, Consul forte vel prætor: quoniam in hoc imperium non habet. Ff. l. 4. t. 8. l. 1. n. 3.—Nam magistratus superiore, aut pari imperio, nullo modo possunt cogi: nec interest ante, an ipso magistratu arbitrium susceperint. Inferiores possunt cogi. S. 4.—Proinde si forte urgeatur a Prætorē ad sententiam dicendam: æquissimum erit, si juret *sibi de causa nondum liquere*, spacium ei ad pronunciandum dari. S. 13. n. 4.—Licet Prætor districte edicat, *sententiam se arbitrum dicere coacturum*, attamen interdum rationem ejus habere debet, et excusationem recipere causa cognita: utputa si fuerit infamatus a litigatoribus; aut si inimicitie capitales inter eum et litigatores, aut alterum ex litigatoribus intercesserint; aut si ætas, aut valetudo, quæ postea contigit, id ei munus remittat, aut occupatio negotiorum propriorum, vel profectio urgens, aut munus aliquod reipublicæ. S. 15.—Et si qua alia incommoditas ei post arbitrium suscep-

tum incidat. S. 16.—Si compromissum sine die confectum est: necesse est arbitro omnimodo dies statuere, partibus scilicet consentientibus, et ita causam disceptari. Quod si hoc prætermiserit, omni tempore cogendus est sententiam dicere. S. 14.—Arbiter judicii sui nomine, quod publicum aut privatum habet excusatus esse debet a compromisso: utique si dies compromissi proferri non potest. quod si potest: quare non cogat eum, cum potest, proferre, quod sine ulla distinctione ipsius interdum futurum est? si tamen uterque velit eum sententiam dicere, quamvis cautum non sit de die proferenda, non alias impetret, quia judicium habeat, ne cogatur, quam si consentiat denuo in se compromitti: Hæc, scilicet, si dies exitura est. S. 16.—Si, cum dies compromissi finiretur, prolato die, litigatores denuo in eum compromiserint, nec secundi compromissi arbitrium receperit: non esse cogendum recipere, si ipse in mora non fuerit, quo minus partibus suis fungeretur. Quod si per eum factum est æquissimum esse, cogi eum à prætorē sequens recipere. S. 21. n. 5.

out his attendance; (a) and if the arbitrator, from the nature of the case, should find that inconvenient, it enables the willing party, in the case of a reference by rule of *nisi prius*, or by rule of court according to the statute, to press his opponent by an application to the court for a rule to shew cause why he should not attend the arbitrator, or why the latter should not be directed to make his award, without such attendance. Thus, where on a trial at *nisi prius* it appeared, that the demand of the plaintiff arose on a long and intricate account, which in almost every article was impeached by the defendant, who also set up a counter demand of the same nature by way of set-off; it was referred by consent, and, the plaintiff neglecting to carry in his vouchers to the arbitrator, before the time limited for making the award, the time was several times enlarged, till at length the defendant, after upwards of six months delay on the part of the plaintiff, made an application to the court, on an affidavit, stating these circumstances, for a rule to shew cause why the plaintiff should not carry in his vouchers within a certain day, and why the time should not be further enlarged, or why, on the plaintiff's further default, the arbitrator should not be directed to proceed on hearing the defendant alone; the rule was granted without hesitation, and the plaintiff, instead of shewing cause against it, peremptorily undertook to deliver in his vouchers within the time specified. (b)

IN this respect the Roman law is something similar to ours, for the party by not attending, and thereby preventing the arbitrator from making his award, forfeited the penalty of his submission. (c)

WHERE an umpire is appointed, and he has occasion to interfere, his duty is the same as that of the arbitrators, and therefore it has been held, that he cannot proceed on their report, but must hear the whole matter from the parties themselves, or at least, by proper notice, give them an opportunity of being

(a) Waller v. King. Ca. in Law and Eq. 2 pt. 63.

(b) Hetley v. Hetley, in the Exchequer. M. 1789.

(c) Siquis litigatorum defuerit; quia per eum factum est, quo minus arbitretur, poena committetur. Ff. l. 4. t. 8. f. 27. n. 4.

heard,

heard, in the same manner, as if the arbitrators had never examined the matter, or as if he himself had been originally appointed sole arbitrator. (a) And if the submission be in the common form, the arbitrators cannot decide on one part of the case and leave the rest to the umpire; for he has the whole authority which they had: (b) thus, where the arbitrators determined the whole of the matters referred to them, except one single point, which related to an account of interest; and, in order to settle that, nominated an umpire, according to the power given them by the submission. The umpire took the facts to be as the arbitrators reported them, and made his umpirage on the interest account only; and on both these accounts, the court set the umpirage aside. (c)

THE authority of this case, however, from the character of the reporter, as well as from the circumstance of its appearing to have been decided in the absence of the Chief Justice, and one of the other judges, is not much to be relied on; and the reasons given for the decision are not very satisfactory. Where the arbitrators have agreed on the facts, and only differ on a single point, either with respect to the law arising on those facts, or the extent of the recompence to be made by one party to the other; or even where they agree on some facts, but differ with respect to others, unconnected with the first, there seems to be no good reason, why the umpire, if he think proper, may not take those points on which the arbitrators agree, to be as they report them. The nature of his duty is only to make a final determination on the whole subject of dispute, where the arbitrators cannot do it; and by adopting their opinion, as far as they agree, and incorporating it with his own on the other points, he effectually makes that final determination; in fact, it is not uncommon for an umpire to act in this manner.

LET this practice, however, be right or wrong, yet, as the whole authority, both of the arbitrators and umpire, is regulated by the submission, and depends entirely upon it; if that be of

(a) 39 H. 6. 9. Rol. Arb. P. 7.

(b) 39 H. 6. 11. b. per Prisot.—
Rol. Arb. P. 8.

(c) Tasker v. Keary. 2 Barnard.

31.

several distinct matters, with a proviso, that if the arbitrators should, by the time limited, make no award of the whole, or of some parcel, then that the umpire shall have power, in the respective cases, to make an award of the whole, or of the remainder. On such a submission, it has been said, that if the arbitrators make an award of part, and not of the rest, then the umpire may make an award of the rest; the whole put together shall be considered as one award, and good, if not inconsistent in its several parts, or at least shall have the same effect as if the whole had been made by one; because it was made according to the authority given by the submission. (a)

THOUGH the words in the submission, which regulate the appointment of an umpire, be not perfectly correct, but might, from the grammatical order in which they stand, seem to imply, that those named as arbitrators, and he who is named as umpire, should all join together to make an award, yet an award made by the first, without the participation of the latter, will be considered as satisfying the terms of the submission.

THE condition of an obligation was, to stand to the agreement of A and B, "being arbitrators chosen for that purpose, to end a controversy between the obligor and obligee, and J. S. being umpire for both parties." In this case it was held, (a) that an award made by A and B, without J. S. was valid; for though the words appeared at first sight uncertain, yet, as it was the common practice, it was said, to appoint an umpire to make an end of the matter, if the arbitrators could not agree, this should be so taken, and the words "J. S. being umpire," should be taken as an affirmative nomination of him as umpire.

THE condition of a bond was, to perform the award which four, named as arbitrators, with the umpirage of a fifth, should make, concerning the title of certain lands. The four named, as arbitrators, together with the fifth, as umpire, made an award concerning the premises: an objection was taken to the condition, that it was repugnant in itself; that an umpire was a judge

(a) 39 H. 6. 11 b. per Prisot. Rol. Arb. P. 8.

(b) M. 12 Car. B. R. Osborn v.

Reydon, on a writ of error on such judgment in the court of Kingston upon Thames. Rol. Arb. P. 6.

by himself, and could not be joined with the arbitrators, their authority being distinct. Whether this objection was considered as having any weight does not appear; for we have only the report of the argument of the defendant's counsel, without answer or judgment from the court. It may be observed, however, that it is perfectly immaterial, whether the parties formed an accurate idea of the distinct offices of an arbitrator and an umpire, their meaning having been clearly, that the first four, with the assistance and approbation of the fifth, should make an award, and that, being made by all five, satisfies their intention. (a)

It has indeed been adjudged, that "if the submission be to the award of four, and if they cannot agree, then to the umpirage of a fifth," the five cannot join to make one award; though it was, at the same time, admitted, that "if the submission be to four, and the umpirage of a fifth," an award made jointly by the five will be good. (b) But this case has since been held to be absurd, and that the joining of the arbitrators with the umpire is but surplusage; their approbation, which is shewn by joining with him, does not render the instrument, purporting to be his umpirage, in any degree less the act of his judgment. (c)

By the Roman law, where there was an unequal number of arbitrators, it was not necessary that all should concur in the award; the judgment of a majority was sufficient to satisfy the terms of submission, though no express provision was made to guard against a difference of opinion. That precaution was seldom taken, but in the case of a submission to two, and then it was not unusual to express it in the alternative, to stand to the award of the one or the other: but it was held, that, in the common case of a submission to three, two could not make an award in the absence of the third; because the latter, had he been present, might have drawn over the others to his opinion. (d)

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(a) *Hunter v. Bunnison*, Hardr. 43.

(b) 1 Bullst. 184.

(c) *Soulby v. Hodgson*. 1 Bl. Rep. 463. East. 4 G. 3. K. B.

(d) In impari numero idcirco

compromissum admittitur, non quoniam consentire omnes facile est, sed quia etsi dissentiant, invenitur pars major, cujus arbitrio stabitur. Ff. l. 4. t. 3. f. 17. n. 6. Si, in tres fuerit compromissum, sufficere quidem duorum

IN this respect the law of England is somewhat different; for unless it be expressly provided in the submission, that a less number than all the arbitrators named may make the award, the concurrence of all is necessary; and where such a proviso is made, all must be present, unless the rest having notice do not attend.

MATTERS in difference were, by consent of parties, referred to three, with a proviso that they, or any two of them, should make an award before a certain time: an award being made by two in favour of the plaintiff, the defendant moved to have it set aside; objecting, that two had not a jurisdiction without the third. On shewing cause against this motion, it appeared, that the third arbitrator had sufficient notice of the meetings of the other two, and might have attended if he would. The court observed, that it was agreed by both sides, that if the third had attended, two might have made an award: two had a jurisdiction, but their meetings ought to be according to the rules of law. If the third had been present, his reasons might have altered the opinion of the other two; he was not therefore to be excluded by fraud; nor were the two to act without the third's having an opportunity to be present; but where the third had sufficient notice, as in the present case, and would not attend, the meeting of the two was regular, and their authority sufficient. (a)

IT was once a question of great difficulty, whether, when the submission was by bond, without providing that the award should be delivered or notified to the parties, it was incumbent on the arbitrator to give notice, or whether the parties did not forfeit their bonds by not taking notice of it at their peril. In the reign

duorum consensum, si presens fuerit et tertius: alioquin, absente eo, licet duo consentiant, arbitrium non valere; quia in plures fuit compromissum, et potuit presentia ejus trahere eos in ejus sententiam, n. 7. Sed si ita sit compromissum, *arbitratu Titii aut Senii fieri*: Pomponius scribit et nos putamus, compromissum valere, n. 4. Si plures arbitri fuerint, et diversas sententias dixerint: licebit sententiae

eorum non dari, sed si major pars consentiat, ea stabitur, alioquin poena committetur: inde queritur, si ex tribus arbitris unus quindecim, alius decem, tertius quinque condemnent cui sententiae stetur? et Julianus scribit quinque debere praestari; quia in hanc summum omnes consenserunt, l. 27. n. 3.

(a) *Dalling v. Matchett*, Barnes 57.

of Edward the fourth this question was agitated, in a case remarkable for nothing else than the many laboured arguments on one side and on the other; and for its having been argued three times by all the judges in the Exchequer chamber, without their being able to come to any decided opinion. It may not, perhaps, be thought improper to state the circumstances of the case, and give a summary of the arguments, that it may appear with what difficulty many points have been established, which afterwards appear so plain, that we are at a loss to conceive how the mind could ever have entertained a doubt upon the subject.

The dutchess of Suffolk brought an action of debt on bond, to which the defendant pleaded, that the condition of the bond was, that if he, the defendant, should stand to the award of the dutchess concerning all matters in difference between him and one B. H, then the obligation should be void, provided that the award were made before the feast of All Saints, and written and sealed with the seal of the dutchess, and delivered to the parties *demanding it*; that, in fact, on the fifth of January the dutchess awarded; that the defendant should pay to B, on the fourth of March then following, twenty pounds, and in April another sum, and several other things: that on the 10th of April next after the fourth of March before mentioned, the defendant hearing of the award having been made, went to the dutchess, and demanded it in writing, and had it; and that he had performed it in all things except the payment of the sum which ought to have been paid on the fourth of March, and insisted that he ought to be excused of that, because he had not notice. Against the plea, it was argued, that it would be against reason that the arbitrators should be driven to give notice to the parties, because they had no advantage, but only a trouble; that it was the business of the parties to be constantly attendant on the arbitrators, and to know when the award was made; that if it was a hardship, the defendant should forfeit his obligation, by not performing that which he did not know; it was his folly to bind himself in that manner; that a man might be bound by his own deed to take notice, at his peril, of many things to which reason and the law would not compel him: that if a man were bound by obligation

to make amends to another for all trespasses committed by him, it was not necessary for that other to give him notice of them, he must take notice of them at his peril: that if one man bound himself to attend another every time the other came to a certain manor, it was not requisite that the other should give him notice every time he went to the manor, he must take notice of it at his peril: that if a man were bound by recognizance to appear on a particular day before the King himself, wherever he should be in England, which means to appear in the King's Bench, which is ambulatory, and attendant on the King, he must be on that day wherever the court shall be, without notice from any body: that if I take a house for a term of years, I am only bound to repair it; and if it fall down, from the weakness of the timber, I am not bound to rebuild it; yet, if I had bound myself to leave the house in as good a condition as I found it, I must rebuild it: that if I command my servant to buy certain goods for me, or constitute a man my factor for that purpose, in such a case I shall be charged for whatever goods they buy, though they never come to my hands, and though I have no notice of the purchase: that if I make a man my bailiff of my manor, and give him power to let the lands of it, in that case, if he let an acre, and do not give me notice of it, if I enter into that acre, and trample down the grass, the lessee shall have an action of trespass against me, though I had no notice that it was let: so, if a man were bound to pay a certain sum to another after the death of his father, and the father should die in a desert, without the knowledge of the son, yet the latter must take notice of it, and pay the money, otherwise the bond will be forfeited: so, it was said, if a man were arrested, and found bail to the sheriff for his appearance on the day of the return of the writ, in that case, if the defendant became sick, so that they could not have him at the day, yet they should not be excused to the sheriff.

BESIDE these arguments, from the analogy of other cases it was urged, that an award was, by common intendment, a matter of notoriety, of which the party must, at his peril, take notice; and if that were not so, then any one, when he perceived that

the award was likely to go against him, might conceal himself, in order to avoid notice.

IN favour of the plea it was argued, that an award was in the nature of a judgment, which could not be given but in the presence of the parties; it was therefore the duty of an arbitrator, like a good and upright judge, to give notice to the parties when he was to make his award; and that, if one of them avoided that notice, it might on the other side be shewn that he absented himself for the purpose: and with respect to the assertion, that he was bound by his own act to take notice of the award, and that it was his folly if he submitted to the arbitration of one who would not give him notice; all the cases cited on the other side differed materially from this.—The man who was bound to make amends to another for trespasses committed by him, cannot insist on notice of any trespass, because they must necessarily be within his own knowledge.—He who was bound to attend another every day he should come to a certain manor, was bound to take notice of the day, which it was in his power to do, because it was a matter that must be notorious; but, in the present case, the arbitrator might make his award, and put it in his pocket.

As to the recognizance in the King's Bench, every man might easily know a thing so notorious as the place to which the court moved; and, by general intendment of law, every man was bound to know it. The case of the house falling down had no analogy to this, for it could not possibly fall down without the tenant's knowledge. Those of the servant, the factor, and the bailiff, admitted of one answer: he who acts by another acts by himself, and therefore he must be supposed to know what the other has done. The case of the man who was bound to pay a sum of money at the death of his father could not be compared to this; there was nobody who was bound to give him notice, or could do it; he must take notice of it himself, because every man's deed was to be construed most strongly against himself: but, in the present case, the obligation could not be forfeited before the award was made; and, as to him, it was as if not made, till he had notice of it. In answer to the case of bail to the sheriff, it was said, that if the defendant were sick, they were excused,

excused, for that his *death* before the return was clearly a discharge of the bond: it was, however, denied on the other side, that the case of sickness was like that of death. It might, however, have been said, that they might still have brought him into court, notwithstanding he was sick; and now that it is understood, that nothing but entering bail above will satisfy the bond for appearance, they may enter an appearance though the defendant be sick.

BESIDE answering these cases, several were insisted on as being more analogous to the present question, which all tended to shew, that a man shall not be bound by any thing of which he had not notice, nor to do a thing impossible; and it was strongly urged, that it was impossible for a man to pay money at a day which had elapsed before he had notice of the award; and this was compared to the case of an award of money to be paid on a day before the submission, which it was confessed was void. That case, however, is clearly distinguishable from the present; for there the thing is impossible from the beginning, but here it becomes impossible only from the want of notice at the time of making the award: and indeed the whole question seems to depend more on principles of general reasoning, than on any analogy it may bear to cases cited on the one side or on the other.

THE impossibility of performance for want of notice seems altogether out of the question, for the defendant, by a constant application to the arbitrator, might have known *when* the award was made, if the latter had been willing to inform him; and if, in fact, she had made her award, but either said that it was not made, or refused to deliver it till the day of performance was past, that would clearly have excused him. But the true criterion is, whether, from the nature of his duty, the arbitrator be bound to give notice of the award to the parties, without any condition of that kind expressed in the submission; or whether the parties themselves must, at all events, take notice of the time when he makes the award: and, considering the subject in this light, these observations seem to have weight.

THE duty of the arbitrator, we have seen, is to give notice to

the parties at what time and place he will sit to hear their complaints, and that it is their duty to attend him on such notice; but it is absurd to suppose that they are to go of their own accord every day to know when he will be attended, or whether he has yet made his award. When, indeed, the day appointed in the submission is come, it may be reasonable that they should call upon him, because that day is within their own knowledge; and if the award be not then made, his power is at an end. The true distinction, therefore, seems to be this, that if the award be made before the day limited in the submission, the party shall not be bound by any thing awarded to be done before that day, unless he has notice, but that he must take notice, at his peril, of any thing ordered at the day. (a) And there is an assertion of counsel, to which the court assent, that though the arbitrator make his award *before* the day, yet, if he give no notice of it to the party, it is void. (b) This was said, in a case of debt, on a bond for the performance of an award, provided it were made before a certain feast, without any proviso that it should be notified to the parties; but it had not its effect, because the want of notice was not properly pleaded, the defendant having, in his plea, denied that any award was made before the day appointed; and, on an award made before that day being set forth in the replication, having rejoined that he had no *notice* of the award before that day, which the court held to be a departure from his plea.

It is true, that in the eighteenth of Edward the fourth, it is said by three justices, "that where an award is made, the parties must take notice of it at their peril, and that this had been before adjudged in the King's Bench in the same King's reign." (c) It is true, that in the first of Henry the seventh, to an action on a bond, the defendant shewing the condition to have been to stand to an award, provided it were made *before* a certain day, pleaded that the arbitrators gave him no notice of any award made *before* that day, and that the court held clearly "that this was not a good plea, because having bound himself to *perform* the award, he was

(a) 8 E. 4. 1. Br. 37.

(b) Keilway, 175.

(c) Brian, Vavisor, and Catesby.
18 Ed. 4. 18. a.

bound to take notice of it," and that they distinguished between this case and *that* where a proviso was added to the condition of the bond, that the award should be made; for "that then such a plea would have been good." (a)

It is also true, that Lord Coke adds the authority of his name to these cases, and says, "that so is the law without question;" but he is clearly mistaken when he says, "that this is against a sudden opinion in the eighth of Edward the fourth:" (b) no decided opinion was in fact given at that time, notwithstanding the number of times the case was argued, and the variety and extent of the arguments.

THE same doctrine is also considered as established law in many other books; (c) but that may well be admitted without impeaching the soundness of the distinction before made. The cases in which the point is decided seem, from the manner of pleading, to have related to a breach of the award in something awarded to be done *after* the day appointed for making it; and the other books, in which the doctrine is recognized, only mention it as established law, without reference to any particular case.

THE Roman law did not impose such a hardship on the parties, for the arbitrators were not only obliged to give them notice of the time when they intended to make their award, but to pronounce it in their presence; and, if on notice given for that purpose, either of the parties did not attend, he forfeited the penalty of the submission, but no award could be made, (d) unless it had been specially expressed in the submission, that sentence might be pronounced in the absence of one or of both the parties.

WHERE the submission is not by bond, there can be no question but the arbitrators must give notice of their award, otherwise the parties are not bound to performance; and indeed this seems,

(a) 1 H. 7. 5.

(b) 8 Co. 92. b.

(c) Vid. Cro. El. 97. Cro. Car. 132, 133.

(d) Si quis litigatorum defuerit; quia per eum factum est, quo minus arbitretur, poena committetur. Proinde sententia quidem dicta non coram

litigatoribus non valebit: nisi in compromissis hoc specialiter expressum sit, ut vel uno, vel utroque absente, sententia promatur: poenam autem is qui defuit, committit, quia per eum factum est, quo minus arbitretur. Ff. l. 4. t. 8. f. 27. n. 4.

by the whole tenor of the arguments in the case of a submission by bond, to be taken for granted: and where the submission is by bond, it has long been the practice to guard against the consequences of want of notice, by inserting a proviso in the condition, not only that the award shall be made, but that it shall be delivered to the parties by a certain day; and then the bond will not be forfeited by non performance, unless the party not performing had notice: and if such a submission be made by the plaintiff on one side, and two defendants on the other; if the award be made before the day, and delivered to the plaintiff and one of the defendants, but not to the other, this will not be sufficient: so, neither it is said, will it be sufficient, where there are two persons on one side, and two on the other, and where the proviso is, that the award be delivered to each of the parties, if it be delivered to one on one side, and one on the other, for "that the word *party* is to be intended of the whole party." (a)

BUT it has been adjudged, that "a proviso that the award should be *delivered* by a certain day is satisfied by the pronouncing of a *parol* award, unless it was also provided, that it should be in writing. Thus, in *Dyer*, (b) a case is reported where the submission was in these words, "so that the award be made and *delivered* before a certain day:" to an action on the bond, the defendant protesting that no award was made, pleaded that the arbitrators did not deliver in *writing* any award; but judgment was given against him, because he had not denied that a *parol* award was pronounced; for the court held, that a *parol* delivery was sufficient.

BUT whether a proviso, in these words, "so that the award be made and *ready* to be delivered," can be satisfied by a *parol* award, has been thought a question of more difficulty.

AN action was brought on a bond for performance of an award, in the condition of which it was provided, that it should be made and *ready* to be delivered to the parties, or such of them as should be ready to receive it: the defendant pleaded that no award was

(a) *Hungate's case*. 5 Co. 103. Cro. El. 885. Mo. 642. pl. 885.

(b) 218. b. Pasch. 3 El. Rot. 927.

The record of this case is said to be in the new book of entries, tit. Delt. pl. 10. fol. 126.

made; the plaintiff replied, and set forth a *parol* award, averring, that it was *ready* to be delivered according to the terms of the condition: to this the defendant demurred, insisting, that the words "*ready to be delivered*," necessarily imported that the award was to have been in writing; and, in support of this, his counsel cited a case which he said had been lately decided in the Common Pleas, and was directly in point, ^(a) and insisted much on Hungate's case before mentioned from Coke. On the other side it was urged, that the word "*delivery*" was to be understood according to the subject to which it was applied; that in common language a message was said to be delivered, and a man was said to deliver himself well, when he expressed his thoughts with elegance and grace; that if the proviso had been, that the award should be made in writing, the delivery must have been manual; but no such restraint being imposed in the present case, an oral delivery was sufficient, and in support of this was cited the case in Dyer, which, it was said, was full in point.

It may be observed, however, that that case is *not* so directly in point as was here alledged, the proviso there being, that the award should be *delivered*, not that it should be *ready* to be delivered. The court, at first, seemed inclined to think, that a *parol* award could not properly be the object of delivery, but that the words must be understood of a delivery in writing: afterwards, however, Lord Chief Justice Holt, having looked into the case in Dyer, and the record of it in Coke's Entries, said they were very strong authorities for the plaintiff; that the award might have been made in the absence of the parties, and delivered, or pronounced over again in their presence; and if so, what *may* be *delivered*, may be *ready* to be delivered. Powel J. however, said, that if the words had been only, "*so as it be made and delivered*," he would have taken the delivery to be notice of the award given to the parties; but that *ready* to be delivered must be taken to mean a delivery in writing: and he asked, if issue had been taken on the readiness of delivery, how it should have been tried? Holt agreed that he should have been

(a) Wood v. Arditt. Tr. 1 Ann.

of the same opinion with Powell, if the question had been new; but said, that finding so clear an authority, and some reason for that authority, he could not depart from it: so said Gould; but they all said they would be well informed of the case in the Common Pleas, and no judgment was given. (a)

WHETHER an arbitrator could change an order he had once made, was a question much agitated among the Roman lawyers; and it ended in this distinction, that where the sentence pronounced, from the nature of it, and the terms in which it was conceived, amounted to an absolute determination of the whole subject of dispute, he could not alter it, though he afterwards found reason to believe he had erred, because, by pronouncing such a sentence, he had executed his office, and ceased to be arbitrator; but if it comprehended only some interlocutory matter, he might alter it, because his authority still continued. (b)

AND where the submission comprehended different subjects of controversy, distinct and independent of one another, his power to change a sentence pronounced with respect to one of them, without having yet decided on the others, was held to depend on the form of the submission; if by that it was provided, that he should pronounce sentence on all the subjects together, then he might change his opinion given only on one, because he had not, in fact, yet decided the whole question submitted to him; but if it was provided that he should give his opinion separately, then

(a) Oates v. Bromell. 6 Mod. 160.

(b) *Dicere sententiam* existimamus eum, qui eâ mente quid pronunciat, ut secundum id discedere eos a tota controversia velit. Sed si de pluribus rebus sit arbitrium receptum: nisi omnes controversias finierit, non videtur dicta sententia; sed adhuc erit à prætore cogendus. Unde videndum erit, an mutare sententiam possit? et alias quidem est agitatum, si arbiter jussit *dari*, mox vetuit: utrum eo, quod jussit, an eo

quod vetuit, stari debeat? et Sabinus quidem putavit, posse. Cassius sententiam Magistrî sui bene excusat: et ait, Sabinum non de ea sentisse sententia quæ arbitrium finiat, sed de præparatione causæ; ut puta si jussit litigatores Calendis adesse, mox Idibus jubeat, nam mutare eum diem posse: cæterum, si condemnavit, vel absolvit, dum arbiter esse desierit, mutare sententiam non posse. Quia arbiter, etsi erraverit in sententia dicenda, corrigere eam non potest. Ff. 1, 4, t. 8. l. 19, 20.

he could not change it, because this was the same thing as if there had been several submissions. (*a*)

SOMETHING similar to this question appears in our books, though it be not stated exactly in the same form.—If two submit to the award of several, concerning all manner of debts, trespasses, demands, and disputes, provided that it be made by a certain day, and the arbitrators make their award on one day with respect to the debts, on another with respect to the trespasses, and on a third with respect to the other things; the parties are not bound to perform any part but the first, say all the justices but Moyle, and not even that, says Prisot. (*b*) And Rolle, in abridging the case, adopts the latter opinion. (*c*) But it is admitted, that the arbitrators may consult together, on one day, on one point, and make up their minds upon it, and so of another point, another day, and so of a third, on a third, provided they do not make their award of any part before the rest. (*d*)

UNLESS, however, it must be understood, that, in the former case, the parties are ordered to perform the things separately awarded, before the whole award be made, this seems to be a distinction unsupported by any essential difference; for if the arbitrators have in fact made up their minds on one point, one day, and on another, another day, it is in effect the same thing as if they had reduced their opinion into the form of an award on the several points, on the several days, and the whole award must be taken to have effect only from the time when the whole award is finished. The only good reason that can be alledged against their making one part at one time, and another, at another time, is, that on hearing the whole, they may see reason to alter their opinion on some of the parts. If in fact they see

(*a*) Quid tamen si de pluribus controversiis sumptus est nihil sibi communibus, et de unâ sententiam dixit, de aliis nondum? nonquid desiit esse arbiter; videamus igitur an in primâ controversia possit, mutare sententiam de quâ jam dixerat? et multum interest, de omnibus simul ut dicat sententiam, compromissum est, an non. Nam si de omnibus, poterit mutare;

nondum enim dixit sententiam, quod si et separatim, quasi plura sunt compromissa: et ideo, quantum ad illam controversiam pertinet, arbiter esse desierat. Ff. l. 4. t. 8. s. 21.

(*b*) 39 H. 6. 12.

(*c*) Rol. Arb. H. 1. 2.

(*d*) 39 H. 6. 12. Bro. Arb. pl. 29. Rol. Arb. H. 3.

such reason, they may change their award on the particular parts; and if they make no alteration, it is a proof they are satisfied with their first determination on each particular point.

BUT that which bears the nearest resemblance to this question in the Roman law, is the doctrine relative to the reservation of authority. The object of every reference is the attainment of a final and certain determination of the controversies referred; a reservation of any point for the future decision of the arbitrator is inconsistent with that object; and therefore it is established as a general rule, that such a reservation is void; (a) as if the arbitrators order that one of the parties shall give security to the other for the payment of a sum of money, but reserve to themselves the power of considering the propriety of that security; or if they reserve to themselves the power of explaining any doubt that may arise on the meaning of any part of the award. (b) So, it has been resolved, though not till after many arguments, that, if they reserve to themselves the power of altering the whole, or part of the award, this is clearly void. (c)

IT was awarded, that one of the parties should pay so much money to the other, and that if more should appear to be due to the latter, and due proof made of it within a month, then he should also pay that. The submission contained a proviso, that the award should be made before a certain day, which was before the end of the month. Rolle, in his abridgment of this case, says, that this seems a void award, because it is not final. But he adds a doubt, "the issue being, that the arbitrators made no award, and that found in favour of the plaintiff; that the judgment in the Common Pleas was confirmed "on the words of the submission, admitting that part to be void, because it was not averred, that there was any doubt about it before the submission." What was the judgment of the Common Pleas does not very distinctly appear by this account, nor what is meant by

(a) 19 E. 4. 1. Rol. Arb. H. 4. vid. Selby v. Ruffel. 12 Mod. 139.

(b) 2 Rol. Rep. 214, 215.

(c) 2 Rol. Rep. 189, 214. Palmer 110, 146.

"admitting

"admitting *that* part of the award be void:" but it is most probably meant to be expressed, that the judgment of the Common Pleas was in favour of the plaintiff, and that that part only which related to the payment of a further sum on due proof was void, the rest of the award being valid. (a)

A SUBMISSION respected the privilege of cutting down trees in a certain wood, and it was awarded, as to part, that the defendant should leave so many of the trees to the plaintiff for housebote and hedgebote, as the arbitrators, on advice with council at the assizes, should appoint; it was held, that this was a reservation of authority, and therefore void. (b)

BUT an award, "that one of the parties shall pay to the other 105l. on a certain day; and if he do not pay it then, that he shall pay at a future day 110l. is said to be good; because it is not a reservation of a future authority, but a penalty to enforce payment at the day, which is within the power of the arbitrators. (c)

A SUBMISSION to an award contained a proviso, that it should be made before Michaelmas, and the arbitrators awarded, that the one should pay 5l. to the other for ten loads of hay, and several other sums for other things; and further awarded, that if he who was to pay should disprove the receipt of the commodities, or should give better proof of the payment of some sums of money, before the arbitrators, or one them, before the said feast of Michaelmas; then so much as should be so proved, should not be paid at that feast. (d) In two reports, both apparently of this case, it is agreed, that this is a reservation of authority; but they do not agree in stating the effect of it on the whole award. Rolle says, that the reservation is void, "but that the former part of the award being good, shall stand, because the authority of the arbitrators was determined." But Hobart says, that the court took time to advise, "whether this reservation

(a) Rol. Arb. H. 13.

(b) Thinne v. Rigby. Cro. Jac.

315.

(c) Royston v. Ryall. 2 Jac. Rol. Arb. H. 8.

(d) Beckwith v. Warley. 16 Jac. Rol. Arb. H. 9. Warley v. Beckwith. Hob. 218.

should frustrate all reaching to the award, or whether the award should stand, and the reservation be void."

If it be a rule in the construction of awards, that they shall be certain and definite, it would seem in this case, that the reservation rendered the whole award void, because it renders it altogether uncertain; and this is consonant to what is laid down in another book, (a) as a general distinction, "that where the arbitrator reserves a power over any thing submitted, the award is not final, and therefore it is void; but where the thing over which he reserves the power is not within the submission, the power is void, and the award, as far as that extends, void also; but in the thing submitted, the award is final and peremptory."

THE following seems an example of the application of the first part of this distinction: a question, relative to certain currants, was submitted, and an award was made in these terms; that if the defendant could make it appear, before the 20th of December, that the currants were delivered to the plaintiff, then the arbitrators would make a further award within fourteen days after, if they could agree; otherwise, that J. S. as umpire, should conclude it in seven days after; that the plaintiff and defendant should stand to the award of the arbitrators, if they made one, and if they made none, to the determination of the umpire. But if the defendant, before the 20th of December, should shew no such proof, it was, in that case, awarded, that the plaintiff should not pay for the currants, but should be free from any further claim on that account; and it was further awarded, that the defendant should pay to the plaintiff 19l. 12s. before the first day of January after, if no award should be made before that time for the currants.—This award was held to be altogether void, for that the first part was void, being partly a reservation, and partly a delegation of authority; and if an award had been made, according to the power reserved or delegated, it was not intended that the defendant should pay to the plaintiff the 19l. 12s. and the latter clause depending on the first, which was void, must also be void. (b)

(a) Palmer. 110, 146.

(b) Brown v. Dalton. M. 9 Car. B. R. Rol. Arb. H. 10.

A DISTINCTION is also made between the reservation of a further *ministerial* act, and of a *judicial* one; the former, it is said, may be reserved, the latter cannot; all the judicial authority of the arbitrators determines with the time limited for them to make their award; but they may reserve a further *ministerial* act to be done either by themselves or by a stranger, at any subsequent period.—However well founded this distinction may be, it is not always very successfully exemplified by the cases in the books. It is said, if one of the parties assert, that he has a receipt for a certain debt claimed by the other, the arbitrator may award, “that if he produce the receipt before such a day, after the time limited for making the award, then he shall be discharged of that debt; but if he cannot produce it by that day, then he shall pay the money;” for that this is only the reservation of a ministerial act. But, with deference to the authority of the book, it is neither the reservation of a ministerial nor of a judicial act, but an award, of which the final determination depends on a future contingency, and therefore the question, whether it be good or bad, depends on another principle, which requires, that all awards should be final and certain.—On the same distinction, it is endeavoured to support the authority of a case, cited from the year books, (a) but which is not to be found there. This was the case of a submission of a dispute concerning a horse; one of the parties insisted, before the arbitrator, that the horse was worth 20*l.* the other that he was only worth 10*l.* The arbitrator awarded, that if J. D. should say that the horse was worth 20*l.* then the one should pay to the other 20*l.* if 10*l.* then only 10*l.* and this, it is said, was held to be a good award, as being only the reservation of a ministerial act; had there been other subjects of dispute, and the arbitrator, in order to satisfy his own mind about the amount of damages to be given, had referred to J. D. to set a value on the horse, this might have been considered only as a ministerial act; but as the case is here stated, the only question referred to his decision appears to have been, to settle the value of the horse, and by re-

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(a) 30 H. 6. tit. Arbit.

ferring it to the judgment of J. D. he delegated his whole authority, which he had not power to do. (a)

NEITHER have the court been always unanimous in their opinion of what should be considered as a judicial, and what as a ministerial act.—An umpire ordered that the defendant should deliver to the plaintiff certain goods particularly specified; and that the plaintiff should deliver to the defendant certain other goods also by name: but that if any of the goods, on either side awarded to be delivered up, should be lost or mislaid, then the party, on whose side the deficiency should be found, should pay to the other the value of them, according to the appraisement of the umpire and the arbitrators. It was disputed, whether this should be considered as a judicial or a ministerial act. Trevor, Chief Justice, and Blencow, Justice, were of opinion, that it was the former; Powell, Justice, that it was the latter. (b) If the valuation of the horse, in the last case, could be considered as a ministerial act, surely this appraisement ought to have been so too.

A SUBMISSION was, of disputes concerning certain land, and it was awarded, that one of the parties should pay a certain sum of money to the other for every acre, to be measured by an able measurer in the presence of the arbitrators, at the rate of so many yards to the pole. This was held clearly to be only a ministerial act, to ascertain the quantity of the land. (c)

THE submission by the litigating parties, to the *Delegation of* decision of an individual, arises from the confidence which they repose in his integrity and skill, *their Authority.* and is merely personal to him; it is therefore inconsistent with the implied intention of the submission, that the arbitrators or umpire should delegate any part of their authority to another, or refer to him the decision of any point on which they find any difficulty to decide themselves. On this principle it is established as a general rule, both in the civil and the English

(a) Vid. for these two cases, 2 Rol. Rep. 189. 214.

(b) Cockson v. Ogle. 13 W. 3. C. B. Lutw. 550

(c) Hunter v. Bennison. Hardr. 43.

law, that a delegation of authority is void. (a) Therefore, if instead of deciding the matters submitted to him, the arbitrator direct that the parties shall stand to the award of a third person, this is void. (b) So, if he award, that the defendant shall account before such auditors as the plaintiff shall assign, and that if he be found in arrears, he shall pay the sum found, and that each shall then go quit against the other. (c) And the same rule prevails where the delegation is necessarily implied, as where it is expressed; and therefore if the arbitrators leave the matter incomplete, the defect cannot be supplied; as if they award, that one of the parties shall give a bond to the other without mentioning in what sum, the award is nugatory, because neither the plaintiff nor the defendant can determine the sum. (d)

So, where it was awarded, as to part, that the defendant, at such a time and place as the plaintiff should appoint, should make a public confession of his offence for the battery of the plaintiff: this was held to be void, because the arbitrator ought to have determined the time and place, and not to have left their appointment to another, more especially to the plaintiff, who, thereby became judge in his own cause; for though in general, time and place are but circumstances, yet in such a satisfaction as this, they make the most considerable part. (e)

BUT where arbitrators award the substance of the thing, and leave only the form to be settled by another, or the amount of a sum to be calculated, this is not such a delegation of their authority as to vitiate the award; for the same distinction be-

(a) *Puto vere non committi, si dicat ad judicem de hoc eundem, vel se vel alium: in se vel in alium compromittendum.* Nam et Julianus impune non pareri, si jubeat *ad alium arbitrum ire*, ne finis non sit—ne propagentur arbitria, aut in alios interdum inimicos agentium transferantur, suâ sententiâ finem controversiæ imponere eum oportet: non autem finiri controversiam, cum aut differatur arbitrium aut in alium transferatur;—idque delegari non posse nisi ad hoc compromissum sit, ut arbiter statueret,

cujus arbitrato satisfidaretur. *Ff. l. 4. t. 8. f. 32. n. 16.* In compromissis arbitrium personæ insertum, personam non egreditur. *S. 45.*

(b) *M. 8 Ed. 4. 27 Ed. 3. 20 Brooke 44. b. Jenk. 129 H. 37 El. inter Lower et Lower Rol. Arb. B. 20 H. 11.*

(c) *30 H. 6. Fhbt. 52. b. Rol. Arb. I. 9.*

(d) *Samon's case. Cro. El. 432. 560. 78.*

(e) *Glover v. Barrie. 10 W. 3. C. B. Lutw. 1597. 1 Salk. 71.*

tween a judicial and a ministerial act prevails with respect to the delegation as the reservation of authority.—Thus, an award, “that one shall pay rol. to the other, and, for security of payment, shall be bound in an obligation, by the advice of counsel,” is good, for it is incident to the award, that counsel should make the payment sure. *(a)* So, if it be awarded, that on payment of rol. by the one, the other shall give a general release, as fully and beneficially as counsel shall advise, this is good; for it gives no power to the counsel to do a judicial act; their authority is only ministerial. The arbitrator has directed the extent of the release, by ordering it to be general, and the counsel is only to see that it be so drawn as to have that effect. *(b)* So, if in order to decide the title to certain land between the parties, the arbitrators award, that an action should be conceived by the advice of certain counsel; for this is not referring the matter to their judgment on the substance, but on the form. *(c)* But a distinction in these cases seems formerly to have been made between such a reference to counsel, and to a stranger. When made to the latter, it was said to be the delegation of a judicial act, and therefore void; *(d)* but this seems to be a distinction without any foundation. *(e)*

On this point there is some uncertainty in the Roman law; some holding, that a reference to another to settle the form which should give effect to the substance of the award, was generally valid; while others held that it was void, unless it was made in consequence of a power given for that purpose in the submission. *(f)*

THAT arbitrators, where they award the substance of the thing

(a) 19 Ed. 4. 1 Rol. Arb. H. 5.

(b) Tr. 1650 Cater v. Startut on demurrer. Rol. Arb. H. 7. Style 217, 218.

(c) 8 Ed. 4. 11. a. Brooke 37.

(d) 19 Ed. 4. 1. Rol. Arb. H. 6. Emery v. Emery. Cro. El. 726.

(e) Jenk. 128.

(f) Quod si hoc modo dixerit, ut arbitrio Publii Mævii fundus tradetur, aut satisfactio detur: puto pa-

rendum esse sententiæ. Idem Pedius probat—finem controversiæ imponere oportet; non autem finiri controversiam cum arbitrium in alium transferatur, partemque sententiæ esse, quem admodum satisfactio, quibus fidejussoribus; idque delegari non posse, nisi ad hoc compromissum sit, ut arbiter statueret, cujus arbitratu satisfactio. Ff. l. 4. t. 8. l. 32. n. 16.

to be done, may refer it to another to settle the manner in which it shall be put in execution, is now fully settled by a determination of Lord Hardwicke's.

By the consent of plaintiff and defendant in several causes, depending in Chancery, respecting partnership transactions, an order was made, that all matters in difference between them, relating to their joint dealings, or otherwise, should be referred to arbitration. The arbitrators made an award, and the plaintiff filed a bill against the arbitrators and the defendant, to have an inspection of all the accounts from which the arbitrators had framed their award, that the award might be set aside; and that the defendant might account generally for all transactions during his partnership with the plaintiff.—The defendant pleaded the reference by consent, and that the arbitrators had, within the time limited, made their award, which he set forth, and which, among other things, contained the following orders: Having given, in a schedule to their award, an account of several debts and effects owing to the partnership, to the amount of 5094l. 14s. 2d. they awarded, that these debts and securities should belong in moieties to the plaintiff and defendant, and, that they might be the better collected, they recommended to the parties to consent, that an order should be made by the court, for the appointment of a proper person, conversant in mercantile affairs, to collect in the same for their joint use; and, in case either of the parties should refuse their consent, the arbitrators made it their humble request to the court to order the same, as being the most probable means of preventing future litigations between the parties.

THEY awarded and declared that, exclusive of the above matters, there was then due, from the plaintiff to the defendant, the sum of 9194l. 19s. 6d. on a fair balance, which they awarded to be paid by instalments of 2000l. at a time, with interest at 4l. per cent.

AND lastly they awarded that, on payment of the 9194l. 19s. 6d. by the plaintiff, his executors, &c. to the defendant, his executors, &c. they, the said plaintiff and defendant, their respective executors and administrators, should mutually execute and

deliver to each other respectively a good and sufficient release and discharge, by which the said parties should respectively release to each other all matters in difference between them, relating to their joint dealings; and that the form of the release should be previously settled by one of the masters of the court, in case the court should be pleased to give directions for that purpose.

To the first part of this award, it was objected, that the recommendation of the arbitrators to the parties to consent, that an order should be made by the court for the appointment of a proper person to collect the debts due to the partnership, was a deputation to a third person to do an act which ought to have been done by themselves, and that therefore they had not properly exercised their own judgment. To the second part it was objected, that the arbitrators ought to have settled the release themselves, and not to have left it to be done by a master under the order of the court.

With respect to the first objection, Lord Hardwicke said, he had entertained great doubts; but as the justice of the determination was [the material thing, and as the award answered the purpose of parties, in submitting to a reference, if it was good to a common intent, he was now of opinion it was sufficient; for that in cases of this sort, in mercantile affairs, which could not admit of certainty, it would be too nice to defeat awards on objections of this kind. It had been said, that the recommendation to the parties by the arbitrators, to consent that an order should be made by the court for the appointment of a receiver, and in case of the parties refusal, the request to the court to make such an order, was a delegation of their power. If it were indeed a delegation of their power, the award was void for the whole; but it had been answered, that what the arbitrators had done in this respect was, at most, but surplusage; yet his Lordship observed, if it affected the justice of the case, with respect to the things submitted, it would not be merely surplusage. But it seemed to him, that this recommendation was not compulsory on the parties, but left them at large; and if they did not approve

approve of the scheme, it was surplussage only, and not a delegation of their power.

THE true question was, whether the award, that the debts due to the partnership, when received, should be divided in moieties between the parties, was sufficient? and he was of opinion it was, for the arbitrators had no controul over the debtors themselves, who might, if they pleased, pay the whole to one of the partners.

To lay it down as a general rule, he said, that arbitrators must particularly point out the method in which their award should be carried into execution would be too nice, and such a rule would overturn a great number of awards; if, in such a case as the present, one of the parties should release a debt due to the partnership, that would be a breach of the award, and the other party could have no remedy but by action, or bill, to have the award carried into execution, and then no award could ever be effectual to finish disputes between contending parties.

In the present case, he could think of no other method the arbitrators could have pursued: it had indeed been said, that they might have directed the parties to give such person, as they should appoint, a letter of attorney to get in the debts; but this would not have been advisable, because if the person so deputed had proved insolvent, it would have been doubtful whether the arbitrators themselves would not have been liable.

As to the last objection, he said, the award had fully and completely described what the parties should do, with respect to giving releases, and then followed the reference to the master to settle the form. If the award had said, that the release should be settled by the court first, and then the arbitrators would consider whether they should order a release between the parties, this would have been very different, and he should have thought it a delegation of their power, and the award consequently void; but here they had awarded releases, and only left it to the court to give directions to a master to settle the form: and it would be very extraordinary, when he thought the arbitrators had done all that was necessary, and when there was no occasion for the court to interfere, yet, because they had said they left it to the court,

therefore he must interpose merely for the sake of making that a bad award, which, without his interposition, would have been good. (a)

After the introduction of references at *nisi prius*, there could be no question but the arbitrator had a jurisdiction over the costs of the action, as well as over the subject of the action itself, unless it was provided by the form of the submission that the costs should abide the event, or that each party should pay his own costs; or unless there was some other restriction with respect to the costs: because unless there was some restriction, the costs accruing before the reference was within the submission; and in this case, if the arbitrator incorporate the costs with the damages, the court cannot interfere; neither can they interfere when they are given separately, unless they are excessive, and then only by considering their excess as an evidence of undue practice. (b)

It afterwards became a question, however, whether the arbitrator, instead of ascertaining the costs himself, could refer it to the proper officer of the court to tax the costs; and it was settled, on debate, that he might, the courts comparing awards to judgments at law, to which, though certainty be requisite, yet the officers always tax the costs; and therefore, where the arbitrator gives such directions, this does not defeat the award. (c) Where the arbitrator awards costs of suit to be taxed, without saying by whom, it must be understood that they are to be taxed by the proper officer of the court, that being the settled mode of taxing costs by the law of the land. (d) If he award simply that one of the parties shall pay costs, without specifying the sum, or saying "to be taxed," the court will supply it, by ordering them to be taxed by the proper officer. (e) But if he award costs of the suit, and of the reference, the court will order only the costs of suit

(a) *Lingood v. Eade*. 2 Atk. 501. (515).

(b) *Shephard v. Brand*. B. R. H. 54.

(c) D. per Ld. Hardwicke. 2 Atk. 519. (504). *Winter v. Garlick*.

1 Salk. 75. 6 Mod. 195. 2 Keb. 231. *Nutt v. Long*. B. R. H. 181.

(d) *Barnes*, 56. vid. 1 Sid. 358.

(e) *Dudley v. Nettleford*. Str. 737. *Thomlinson v. Arrikin*. Comyns. 330.

to be taxed, because the officer cannot judge of the costs of the reference. (a)

BUT the arbitrator cannot refer the settlement of costs to any person who is not the proper officer of the court, because the court have no controul over any other person. In an action on an arbitration bond, the plaintiff, in his replication, set forth an award, "which, among other things, ordered, that the defendant should pay such a sum to the plaintiff as J. W. and J. G. should settle for costs, having regard to such costs as are usually taxed by masters in Chancery," and averred, that the said J. W. and J. G. settled the sum of so much to be due for costs, in which he had regard to such costs as are usually taxed by masters in Chancery, and assigned a breach in the non-payment of that sum. To this the defendant demurred, and the demurrer was held good; for though several cases were mentioned, in which costs were awarded, it was answered, that these were all of costs to be taxed by the proper officer of the court, or costs generally, which meant the same thing; that this was reasonable enough, because the reference to the proper officer made an end of the matter, as he was subject to the authority of the court, who, if he erred, could amend his errors summarily; but they had no controul over a stranger. And it having been argued, that this taxation was a ministerial, not a judicial act, and that arbitrators might delegate a ministerial act; it was answered, that this was not merely a ministerial act, and appeared not to be so, from the terms in which the award was penned; for the referees were directed to have regard to such costs as the master would allow, which was an act of judgment: reference to an officer was merely ministerial, to a stranger judicial. (b)

NEITHER can the arbitrator award a sum of money in certain, and also the costs of suit depending in an inferior court, because, says the book, there is no mode of ascertaining them; in this case, therefore, he must necessarily ascertain them himself. (c)

(a) Barnes, 58.

(b) Nutt v. Long. B. R. H. 181. Str. 1025.

(c) 6 Mod. 195. Salk. 75.

IF, in any point, the arbitrators order that the parties shall stand to the award already made on that subject by former arbitrators, this is not such a delegation as to defeat the award; for it only expresses their approbation of what others have done, and has the same effect as if they had repeated the former award as from themselves, in so many words. (a)

So, an award, "that one before made by another arbitrator shall stand in all other respects, except, that whereas in the former award one was to pay 10l. at Michaelmas, he shall have 'till Christmas to pay it," is good; for this is the same thing as if, without referring to the former award, they had repeated it with this alteration. (b)

WHEN by the submission a time is limited for making the award, it seems *At what Time they may make their Award.* hardly necessary that it should have been judicially decided that it might be made on the day of the submission, yet a decision to that purpose is gravely reported. (c) It has also been found necessary to declare judicially, that the arbitrators may make their award in the evening of the day preceding that before which it is limited to be made, provided they do it before midnight. (d)

(a) 39 H. 6. 11. a. per Prisot.
(b) Semb. sed quære. Car. Rol. Arb. H. 12. Tr. '3 Jac. dubitatur.

(c) Latch. 14.

(d) Withers v. Drew. Cro. El. 6; 6.

C H A P. V.

THE AWARD OR UMPIRAGE.

IT has been laid down as a general rule, that the arbitrator is a judge, from whose sentence there is no appeal, and that no other tribunal can inquire into the equity of his decision. (a) This is equally the general doctrine of the civil and the English law; but in both it is guarded with particular restrictions, derived from the nature of the authority conferred on the arbitrators, and the implied engagement under which the contending parties bind themselves by their submission. (b) The chief of those restrictions is that which requires that the award should be consistent with the terms of the submission, the whole authority of the arbitrators being derived from thence. (c)

THE principal distinction in the Roman law, is that between what is called a full, and what is called an incomplete submission. A full submission was that which comprehended all kinds of controversy, and every subject of dispute between the parties: an incomplete submission extended only to some particular matter; yet, if the meaning of the parties was to confine the authority of the arbitrator to one subject,

(a) Arbitrorum genera sunt duo; unum ejusmodi, ut si æquum sit siue iniquum, parere debeamus; quod observatur cum ex compromisso ad arbitrum itum est. Ff. l. 17. t. 2. f. 76, 77, ante page 43. Qualem autem sententiam dicat arbiter, ad Prætores non pertinere, Labeo ait, dummodo dicat quod ipsi videtur. Ff. l. 4. t. 8. f. 19.

(b) Vid. ante page 3. Quæsitum est de sententia dicenda? et dictum, non quamlibet: licet de quibusdam

variatur sit. Ff. l. 4. t. 8. f. 32. n. 16.

(c) De officio Arbitri tractantibus sciendum est, omnem tractatum ex ipso compromisso sumendum: nec enim aliud illi licebit, quam quod ibi, ut efficere possit, cautum est. Non ergo quodlibet statuere arbiter poterit, nec in re qualibet: nisi de quâ re compromissum est; et quatenus compromissum est. Ff. l. 4. t. 8. f. 32. n. 15.

though

though by inadvertency the submission was full, the intention of the parties prevailed over the strict form of the submission, and they were not concluded, by a general award, from suing one another, on all those causes of action which were not intended to be submitted. (a) It was also a rule, that though the submission was full, yet it comprehended only those disputes which existed at the time of the submission, and that the arbitrator could not decide on any thing which had subsequently arisen. (b)

THE same distinction between a full and a particular submission is also recognized in the English law; but that is far from being alone sufficient to explain the great multiplicity of cases that occur: it will therefore be necessary to compare the terms of the award with that of the submission under which it is made, arranging the cases according to the particular branches of the general rule to which they more immediately refer.

THE first branch of the general rule is, that the award must not extend to any matter not comprehended within the submission.

THUS, if the submission be confined to a particular subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void, as far as it respects them. (c)

BY a submission of all actions personal, the arbitrators have no power to make an award of any thing in which the parties have only a cause of action. Thus, in case of such a submission, an award "that one of the parties shall convey E, the servant of the other, to London," is void, unless it appear that an action was depending relative to this servant. (d)

(a) Plenum compromissum appellatur, quod de rebus controversiisve compositum est: nam ad omnes controversias pertinet. Sed si forte de una re sit disputatio, licet pleno compromisso actum sit, tamen ex cæteris causis actiones superesse: id enim venit in compromissum, de quo actum est ut veniret. Sed est tutius si quis de certa re compromissum facturum sit,

de ea sola exprimi re. in compromisso. Ff. l. 4. t. 8. s. 21. n. 6.

(b) De his rebus et rationibus et controversiis judicare arbiter potest, quæ ab initio fuissent inter eos, qui compromiserunt, non quæ postea supervenerunt. Ff. l. 4. t. 8. s. 46.

(c) Vid. 2 Mod. 309.

(d) 36 H. 6. 11 b. Bro. Arb. pl. 27, 50.

BUT

BUT had the submission been of all actions and *complaints*, this would have comprehended *causes* of action; and the award, with respect to the conveyance of the servant, would have been within it.

IF the submission be of all actions personal, suits and complaints, the word "personal" extends to suits and complaints, and consequently an award of all actions real is beyond the submission; but if it be of all actions personal, *and* suits and complaints, the word personal does not extend to the latter part, and an award on such a submission may comprehend actions real. (*a*)

YET, where the submission is only of things real, the award may order a sum of money to be given in satisfaction. The submission was concerning the right and possession of a manor; it was awarded, that one of the parties should release his right in the manor to the other, and that the other should pay him twenty pounds: it was held, that though the submission was only of things real, yet the award of the twenty pounds was good. (*b*)

IT seems also to have been the prevailing opinion in the same case, that where the submission is of things personal, yet the arbitrator might award something in the realty in satisfaction: this may perhaps be well founded, where the party to whom the thing in the realty is awarded in satisfaction is ordered to give up some personal demand, to which otherwise he appears to be intitled; for in such a case the award will amount to the order merely of a bargain and sale, but I doubt much whether it can be supported in the general terms in which it is here conceived. An award of money in satisfaction of any injury is good, because money is the universal standard by which damages are estimated and property valued: but it seems to be altogether unreasonable to permit an arbitrator, to order, without restriction, the transfer of any property, or the performance of any particular act, unless that article of property, or that particular act, have an immediate connection with the subject of dispute. Thus, where the submission relates merely to a trespass, or to a claim of any specific kind, it would be highly unreasonable to leave it to the caprice of an ar-

(*a*) 9 Ed. 4. 44. a. Fhbt. 52. a. Rol. Arb. D. 6. 7.

(*b*) Id. *ibid*.

bitrator to order one of the parties to deliver to the other a particular horse, or a particular article of dress, or to release his right in a certain piece of land, which were severally unconnected with the dispute submitted to him. (a)

THERE are, however, one or two cases which seem to convey an idea that, in modern times, an award of something else than money, in satisfaction of a trespass, would be considered as valid.

To an action of trespass, the defendant pleaded a submission by himself and the plaintiff, to the award of J. S. who ordered that the defendant should provide a couple of fowls, at his mansion-house in Old Bedlam, to be eaten by the plaintiff and his friends, on Wednesday or Thursday in a certain week, in satisfaction of the trespass; he averred that he had, on Thursday in the week appointed, provided two fowls, but that the plaintiff and his friends had not come to eat them. No objection was made to this award, because it ordered something to be done which had no relation to the subject of the submission; but it was objected, that being an award of a *collateral* thing, it could not be a good bar without execution; the word "collateral" being here used in contradistinction to the payment of money; and that therefore the defendant ought to have given notice to the plaintiff, on which of the days, and at what hour he would provide the fowls. But the court thinking the matter of too ludicrous a nature to deserve a solemn decision, gave no judgment, but recommended that it should be compromised. (b)

In another case, it is said, that, by the better opinion, an award, "that the defendant should make a submission before the mayor of a town, for an injury done to the plaintiff," is good; but this was not the point directly in question; for the arbitrator had awarded, that the defendant should make this submission at any time and place, at the discretion of the plaintiff, which the court held to be clearly bad, because it made the plaintiff judge

(a) Vid. 9 Ed. 4. 44. Rol. Arb. B. 11. Dict. cont. per Moyle.

(b) Purflow v. Bailly. 6 Mod. 221. 2 Ld. Raym. 1039. 1 Salk. 76.

of the satisfaction to be given to himself; time and place in such a case, making a principal circumstance. (*a*)

NOTWITHSTANDING the conclusion which might be drawn from these cases, it is conceived, that an award of any thing, not connected with the subject of dispute, is not binding on the parties.

If two submit to the award of a third person, all *demands* between them, without more; the word "demand," implies all matters between them, concerning the lands of both parties, which are the subject of variance. (*b*)

If the submission be, "of all causes of action, suits, debts, reckonings, accounts, sums of money, claims, and demands;" an award "to release all bonds, specialties, judgments, executions, and extents," is within the submission; for as all debts are submitted, the arbitrators have power to make their award concerning the debts themselves, and of course to award a release of every thing by which they are secured. (*c*)

WHERE the submission is "of all debts, trespasses, and injuries, an award "to release all actions, debts, duties, and demands," does not exceed the submission; for the word "injuries" is sufficiently comprehensive to imply all "demands." (*d*)

If the submission be "of the right and title of a manor, and other lands and tenements, and of all manner of actions and demands," an award, "that one of the parties shall deliver to the other a deed of annuity, by which forty shillings a year were granted to the wife of the former, to be taken out of the manor," is binding on the husband, because, it is said, he is intitled to it in right of his wife. (*e*)

If the submission be "of all suits and actions depending between A and B," the arbitrator cannot make an award of an action which B and his wife have depending against A, because

(*a*) 3 Sid. 12.

(*b*) Keilway 99. vid. 1 Ld. Raym.
115 acc.

(*c*) Roberts v. Marriot. 2 Saund.
190.

(*d*) 3 Bulstr. 312.

(*e*) 21 H. 6. 19. Br. 452. Pl. 22.
sed quære et vid. page 28.

that

that is out of the submission, the action between B and his wife, and A, not being an action depending between A and B. (a)

If the submission be "of controversies between the plaintiff and defendant, for divers sums of money laid out for the defendant's wife, at her request, while she was sole," an award, "that the defendant shall pay to the plaintiff a specific sum, for all sums of money laid out by the plaintiff for the wife of the defendant while she was sole," is said to be void, as being beyond the submission; that being confined to all sums laid out at her request, and the award being general of all sums laid out for her, of which part might have been without her request. This is reported to have been adjudged on a writ of error, and the judgment of the court below reversed. (b) But, it may well be doubted, whether, at this day, it would not be presumed in favour of the award, that the whole had been laid out at her request.

THE rule, "that an award of any thing beyond the submission is void," is not so strictly interpreted as to extend to every thing *literally* beyond it; if the award be of any thing depending on the principal, it is good. (c)

As if the submission be of all trespasses, and in addition to the award of satisfaction for the trespasses, the arbitrator order the parties to put their seals to the award, this is good, for it is only an appendage to the principal.

So, if the submission be of all trespasses, and the award be, "that one shall pay to the other 10l. and that he shall enter into a bond to him for that sum;" this is good, because it only renders the award more effectual.

ON this principle, it would seem that, 'if the submission be of all actions personal, suits, and complaints, and the award, "reciting that the defendant had committed several trespasses on the plaintiff, and that the plaintiff was seised of a certain house in his demesne as of fee," order that the defendant shall release to the plaintiff all his right in that house, and deliver the deed

(a) H. 38 El. B. R. Brockas v. Savage. Rol. A1b. D. 4.

(b) Waters v. Bridges. Cro. Jac. 639, 640.

(c) 8 H. 6. 18. b. Rol. Arb. B. 2. C. 4. 5. 6.

of release in satisfaction of the trespasses; this is a good award, for though the submission, in this case, be of actions personal only, and the award of a thing connected with the realty; yet there seems to be a natural connection between a release of a man's right to a house, and trespasses committed by him, with respect to it. The Justices, however, are not reported to have been unanimous in this opinion; (a) and Rolle, in abridging the case, gives it as decided the other way, with the exception of Moyle. (b)

THE submission was concerning a term for years, and every thing depending on it; the award included rent to become due at Michaelmas next after the date of the award; this was held to be beyond the submission, because the rent might be extinguished by surrender, eviction, or otherwise, before Michaelmas. (c) The same thing was held at a much later period, where the award, made on the 23d of June, ordered so much rent to be paid, which, by the award itself, appeared not to be due till the 24th of June. (d)

A and B submitted to the award of J. S. a suit depending between them *in ejectione firmæ*. J. S. on that submission, made an award relative to the land for which the action was brought; in an action on the case, for not performing this award after a verdict for the plaintiff, it was adjudged, in arrest of judgment, that the award was beyond the submission. (e)

THERE was a dispute between a parson and one of his parishioners, whether the tythes should be paid in kind or not; and they, reciting the subject of the dispute, submitted to the award of J. S. concerning all matters, as well spiritual as temporal, from the beginning of the world to the day of the date of the submission. The arbitrator awarded, that the parson should have 7l. for the tythes due before the submission, and that the parishioner should pay 4l. annually for the tythes which should afterwards become due. This was held to be a good award for

(a) 9 Ed. 4. 44.

(b) Rol. Arb. B. 13.

(c) Inter Gray et Wicker. Rol. Arb. B. 3.

(d) Barnardiston v. Foulyer. 10 Mod. 204.

(e) Taylor v. Waltam. -P. 10 Car. B. R.

the future tythes; because the submission comprehended not only a dispute concerning the tythes then due, but a question concerning the future *light*. (a)

If two partners refer all matters in difference between them, the arbitrator may dissolve the partnership. At a trial at *nisi prius*, a juror was withdrawn, and all matters in difference between the plaintiff and defendant, who were partners, were referred in the common form; and after the rule of reference was drawn up, the plaintiff openly declared, he would not have it understood, that the arbitrator should have a power to dissolve the partnership. The arbitrator did order the partnership to be dissolved. The plaintiff applied to the court to have the award set aside on this account, alledging, that the arbitrator had exceeded his authority. The court held that, under such a general reference, the arbitrator had clearly a power to dissolve the partnership; and added, that if a difference between a master and his apprentice were referred, the arbitrator had a power to order the indentures to be delivered up. With respect to the plaintiff's declaration, that he would not have it understood, that the partnership should be dissolved, Lord Mansfield observed, this was evidence out of his own mouth, that the dissolution of the partnership was then a matter of dispute. (b)

WHERE the submission is by reference at *nisi prius*, the order in which the words are placed in the rule of reference, gives rise to a material distinction with respect to the power of the arbitrator.—If the reference be “of all matters in dispute in the cause between the parties,” the power of the arbitrator is confined solely to the matters in dispute in that suit.—If it be “of all matters in difference between the parties in the suit,” his power is not confined to the subject of that particular cause, but extends to every matter in dispute between them, though there be cross demands, and though the defendant has not pleaded

(a) Beckingham v. Hunter. H. 42.
El. B. R. Rol. Arb. D. 8.

(b) Green v. Waring. 1 Bl.
Rep. 475.

his demand against the plaintiff, by way of set-off; and a proviso, that the costs shall abide the event, makes no difference. (a)

AN award, "that both shall pay the reckoning contracted at the house where the award was made, is said to be void, because it extends to a time beyond the submission; (b) such an award indeed seems perfectly nugatory, because the landlord of the house may recover against them for the reckoning; but instead of being considered as void, because it extends beyond the submission, it would be more correct to consider it as an award, that, to a certain extent, the expences of the arbitration should be equally defrayed by the parties.

ON the same principle, "of being beyond the submission," an objection has been made to an award, "that land, the subject of dispute, should be measured at the expence of both parties;" (c) though, instead of an award relative to some subject not within the submission, it is rather to be considered as an order for the performance of a future act, which is clearly within the power of the arbitrator.

It appears too, that tho' the arbitrator order a claim of one party against the other, which has accrued since the submission and before the award, to be given up in satisfaction of the balance of claims submitted to him; this should not be considered as an usurpation of a jurisdiction over something not within his authority, but as an award to do a specific future act, for the conclusion of the differences between them. This seems to have been the principle which prevailed in a case, where two submitted to the award of J. S. concerning all matters between them, *till* the submission, and each assumed to the other to perform the award. J. S. reciting that one of them was bound to the other in an obligation made *since* the submission, and *before* the award, ordered the obligee to deliver up the obligation to the other, in full satisfaction of all matters between them:

(a) Vid. 2. Bl. Rep. 1118. 2 | (b) Hall v. Massey. Rol. Arb.
Term Rep. 644, 5. 3 Term Rep. | K. 14.
626. | (c) Hardres 45.

this was adjudged a good award. (a)—Rolle, however, doubts of the propriety of this decision, observing, that though this was in satisfaction of all matters *within* the submission, yet the obligation being itself *out* of the submission, and a thing in action between the parties, it would seem that it is void.

AN opinion long prevailed, that under a submission in the common form, an arbitrator had no power with respect to the costs of the arbitration, because they were something which had arisen since the time of the submission. (b) The only way, therefore, by which he could secure any recompence for his trouble, was to keep the award in his own hands 'till he was paid for it. This, however, might be subject to this inconvenience, that if the parties would not pay for it, and there was a proviso, that it should be delivered within a certain time, an objection might be made to the performance for want of delivery according to that proviso: it became, therefore, a matter of prudence in those, who might be proposed as arbitrators, to refuse the office, unless a clause were inserted in the submission, that the costs of the reference should be according to their discretion. The judges, however, did once go the length of saying, that where it was part of the condition in the submission that the award should be in writing, payment for the writings was intended. (c) And it is now determined, that the power of awarding costs of the arbitration is necessarily incident to the authority conferred on the arbitrator of determining the cause; and that the reason why, in references of this sort, a provision is frequently inserted, that the costs shall abide the event of the award is, that the arbitrator may not have it in his power to withhold costs from the party who is in the right; and that therefore such a provision is to be considered as the restriction of a power, which the arbitrator would otherwise necessarily have. (d)

(a) Nicklas v. Thomas, adjudged good. T. 15 Jac. B. R. Rol. Arb. B. 10. Reporter quære ceo.

(b) Vid. Bushfield v. Bushfield. Cro. Jac. 577, 578. Capel v. Allen Hil. 22 Car. B. R. Al. 10. Rol.

Arb. H. 13. Berry v. Perry. Bridgeman 90, 91.

(c) Pinkney v. Bullock. 2 Keb. 832. vid. 10 Mod. 201.

(d) 2 Term Rep. 645.

WHEN a cause is referred at *nisi prius*, and it is inserted in the order, that the costs shall abide the *event*, which is the usual form, the *event* is taken to mean the *legal event*, and therefore the party, in whose favour the award is made, will not be entitled to any more costs than he would have been, had the trial gone on, and he had had a verdict in his favour.

A CAUSE, in which the plaintiffs were executors, was referred at *nisi prius*, with the usual proviso with respect to the costs abiding the event. The arbitrator awarded, that there was nothing due from the defendant to the plaintiffs; in consequence of which the master taxed the defendant his costs. An application being made to restrain the defendant from proceeding to enforce the payment of these, on the ground that the plaintiffs were executors, and therefore not liable to pay costs, the court held the meaning of the rule to be that which is stated above; and that, as it was clear, that if a verdict had been given against the plaintiffs, or they had been nonsuited at the trial, they would not have been liable to pay costs, they were consequently not liable to this order. (a)

ON a similar reference, the arbitrators found, that the plaintiff's original demand was under 40s. awarding that the defendant should pay the plaintiff only 37s. An application being made to the court to have it referred to the master to tax the defendant his costs of the action, it was contended on his behalf, that the plaintiff was not intitled to costs, any more than he would have been, if, on a trial, he had recovered under 40s. but that on a suggestion to be entered, by leave of the court, the defendant would be intitled to costs. The court were of this opinion, and made the rule absolute. (b)

THE plaintiff brought an action of trespass against the defendants, for pulling down the plaintiff's gates and assaulting him. The defendants justified to all the counts, except one, under dis-

(a) Highnam et al. v. Haffel. H. 14. G. 3. cited 3 Term Rep. 139. must have been a case where the demand arose within the jurisdiction of a court of conscience.
 (b) Butler v. Grubb. H. 23. G. 3. cited 3 Term Rep. 139. This

ferent rights of way, and pleaded not guilty to the whole: the cause was referred at *nisi prius*, the rule of reference restricting the costs of the action to abide the *event*. The arbitrator awarded a right of way to the defendants different from any of those under which they justified, and gave 5s. damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator. It was held, on the authority of the two preceding cases, that the plaintiff could recover no more costs than damages; and further, that the arbitrator's award was not equivalent to a judge's certificate under the 22d and 23d Car. 2. c. 9. (a)

As it is the professed purpose of parties submitting their disputes to arbitration to have them finally settled, so there is no method more effectual to answer that purpose, than the award of mutual releases, after the execution of other parts of the award; there are, accordingly, very few of the cases reported in the ancient books which do not, among other things, include a release: but as the arbitrator could not always be aware of every nice objection to his award, it is very seldom that the period to which the release shall extend is confined to the date of the submission. It is sometimes ordered to the date of the award, sometimes to a period long subsequent, and posterior to the time appointed for the execution of all the other parts, and sometimes generally without any limitation of the time to which it is to operate. In all these cases, it has been constantly objected, that, by awarding such a release, the arbitrator has exceeded his authority: the objection has as constantly been sustained, so far as to determine the award of the release to be void for any thing arising subsequently to the submission. But many cases have gone further, and the award has been frequently considered as altogether void, on account of so trivial an inadvertency in the award of the release. The history of these cases is confused and complicated, and involves a part of the subject, which will make a distinct article very considerable in itself. (b)

(a) *Swinglehurst v. Altham et al.*
3 Term Rep. 138.

(b) Vid. post, "Where an award

shall be good in part though void in part," and, "how awards shall be construed."

THE next branch of the general rule is, that the award must not extend to any one who is a stranger to the submission.

THUS it has been held, that where the submission is between two, and it is ordered by the award that one of them shall convey certain land to the other and his wife, this is void as to the wife, because she is a stranger to the submission. (*a*)

So, if it be awarded that a third person be ready to seal and deliver 15 bonds for the payment of a certain sum to one of the parties, and that he shall do his endeavour that no advantage be taken of a forfeiture committed by that party, all this is void. (*b*)

So, if two submit to the arbitration of certain persons concerning the title of certain lands, and the arbitrators award, that all controversies touching the land shall cease, and that one of the parties, his wife and son his heir apparent, by his procurement, shall make to the other such assurance of the land as the other shall require, this is void; because the wife and son are strangers to the submission. (*c*)

So, it is said, that if the condition of a submission bond be to stand to the award of A and B, who award that one of the parties shall pay 20s. to a third person: this, says Coke, is a void award, and the bond of no force, notwithstanding an opinion to the contrary, which he says is ill reported. (*d*)

So, where it appeared that the plaintiff, in the action then before the court, had formerly brought another action in the King's Bench against the present defendant and one J. P. and that the plaintiff and this J. P. had submitted all manner of trespass and actions between them two, and all other trespasses between the plaintiff and the present defendant; and the arbitrators awarded, that as well for the trespass done by the defendant as by J. P. there should be paid to the plaintiff 100s. which J. P. had paid. This was held to be a void award, because the defendant was not a party to the submission.

(*a*) Samon's case. 5 Co. 77. b.
78. a. Rol. Arb. B. 7.

(*b*) 10 Co. 131. a. b. Rol. Arb.
B. 5. vid. 3 Leon. 62. Mo. 359. pl.
489.

(*c*) Rol. Arb. N. 9.

(*d*) 10 Co. 131. b. Rol. Arb.
B. 6. E. 5. vid. 22 H. 6. 46. b. and
Brooke says *quod mirum*, speaking of
the opinion to the contrary.

WHERE the submission was between three on one side, and one on the other, of all actions and demands between them, it was said by three justices in the Exchequer Chamber, that the arbitrators had an authority to make an award of all joint matters between the three and the one, and also of all matters severally between the one and any one of the three; and that therefore if he awarded that any one of the three should pay so much to the single party on the other side, and that the other two should go quit; or that the single party should pay so much to any one of the other three, the award in these several cases was good. (*a*) And Brooke, in abridging the case, says this is good law; but he denies that what follows is good law, viz. that the arbitrator has an authority to decide on any matter between any two of the other three. (*b*)

IT is in general laid down, that the award of payment of money to a stranger is void; (*c*) but this must be understood to hold only when such payment can be of no benefit to the other party; for an award that one of the parties shall pay so much to a creditor of the other in discharge of a debt due by the other to that creditor, is unquestionably good, (*d*)

So, an award to pay money to W. the plaintiff's solicitor, if it appear from the nature of the case that the payment is for the plaintiff's benefit. (*e*)

So, where it was awarded that the defendant should pay a sum of money for the plaintiff's benefit, to such person as the plaintiff should appoint to receive it, it was said in argument, and assented to by the court, that it would hardly be contended that such an award was not good. (*f*)

So, if at my request, and that of W. N. two others are bound in 20l. and, on a dispute arising between W. N. and me, on this question, among other matters, "which of us shall pay the 20l."

(*a*) 2 R. 3. 18.

(*b*) Br. Arb. pl. 44.

(*c*) Godbolt. 12, 13.

(*d*) R. acc. 1 Lord Raym. 123.
Dodderidge scmb, P. 16 Jac. B. R.

Buckhurst and Mayo's case. Rol. Arb. E. 5.

(*e*) 1 Lord Raym. 123. M. 8.
W. 3. Bedam v. Clerkson.

(*f*) Dale v. Mottram. 2 Barnard.
291. 6 G. 2.

we submit all matters in controversy, and the arbitrator award that I shall pay to the obligée the half, with interest, and W. N. the other half; this is a good award, though the payment of the money be awarded to a person who is a stranger to the submission, because it appears to be an advantage to both parties. (a)

If the award be, that the one shall acquit the other of a bond, in which they are both bound to a third person for the payment of a sum of money, this is good; for though he cannot compel the third person, who is a stranger, to deliver up the bond, or to make a release by the common law, yet, if the bond be not forfeited, he may pay the principal sum to the obligee at the day, and this will acquit the other. If the bond be forfeited, yet he may pay the penalty, which will also acquit the other; or, on satisfaction given, he may compel the obligee to deliver up the bond in a court of equity, or to give a release. (b) So now, since the statute for the amendment of the law, on an action brought for the penalty after forfeiture, he may pay the principal, interest and costs, which will also acquit the other party.

It having been awarded, that the plaintiff and defendant, who were brothers, should pay a certain sum yearly for the use of their mother; this was held a good award by Powell J. because he thought it must be presumed to be for their benefit, or rather because it really appeared to be so, as it was for the use of their mother; and by Holt C. J. because he was of opinion, that a general award of the payment of money to a stranger was good, because it was to be presumed that the parties submitting were bound as trustees, or were by some means liable, and that the payment should be intended for their benefit, unless the contrary appeared. (c)

AND, in general, a distinction is taken between the case of an act awarded to be done by a stranger, and that of an act awarded to be done to the stranger, by a party to the submission: in the latter case the award is said to be good; and if the stranger will

(a) Gray v. Gray, P. 16 Jac.	vid. Becket v. Taylor. 1 Mod. 9.
B. R. Rol. Arb. E. 6. F. 8.	S. P. 2 Keb. 546. S. C.
(b) Barfey v. Clipsham. Rol.	(c) Bird v. Bird. 1 Salk. 74.
Arb. E. 11. S. C. Cro. Car. 541.	

not accept the money awarded to be paid to him, the party's obligation is saved. (*a*)

If the persons comprehended in the award were in contemplation of the submission, though they were not directly parties to it, yet the award is good; as if it be awarded, that all suits shall cease between the parties, or any others in their behalf. (*b*) So, if the submission be by two, concerning a matter which arose between one of them and the wife of the other when she was sole, an award "that the other shall pay to the married man and his wife 10l." is good, because it was on her account that the dispute arose. (*c*)

A DISPUTE arising between A and B on one side, and C, D, and E on the other; C, in consideration of fixpence given to him by A and B, submitted the matter for himself and D and E, and assumed to stand to the award: A and B submitted for themselves on the other side. The arbitrator awarded that C, on behalf of himself and the other two, should pay a certain sum to A and B in satisfaction of the controversy: this was held to be a good award, and C adjudged to perform it, though it concerned two strangers to the submission. (*d*)

A BOND was given by the defendant Clemence to Lynch and Templeman, of which the condition was, that Clemence, the obligor, should perform the award of arbitrators indifferently named, as well on the part and behalf of Clemence as of Lynch, without naming Templeman, "to arbitrate and determine all matters in controversy between the said parties or either of them." The award, "reciting that there were several differences between the plaintiffs Lynch and Templeman on the one part, and the defendant Clemence on the other, and that they had all submitted by several bonds; reciting also, that the defendant was bound to Elizabeth Templeman, now the wife of the plaintiff Lynch: that the bond was in trust for the plaintiff Templeman, and that

(*a*) *Norwich v. Norwich.* 3 Leon. 62.

(*b*) *Onyons v. Cheese.* 10 W. 3. Lutw. 530.

(*c*) *March,* 78.

(*d*) *Bullock v. Dalbie and Gat-*

wood, adjudged H. 14 Jac. and on a writ of error judgment affirmed. Rol. Arb. B. 18. vid. 22 E. 4. 25. 1 Barnardiston. B. R. 85. 1 Keb. 790, 865.

117l. was due on that bond," ordered that the defendant should pay to the plaintiff Templeman 83l. in part satisfaction of the 117l. and for satisfaction of the residue should assign to the same Templeman a certain debt of 34l. due to Clemence by one Henry Beesley of London, and should execute and deliver to the same Templeman sufficient authority to sue for and recover the said debt, with covenants to be inserted in that authority; that he should not revoke it, nor receive the money from Beesley, but that he should aid and assist Templeman to recover it; that he should also make an affidavit in writing before a master in Chancery, that the sum of 34l. before mentioned, was really and justly due to him from Beesley; and that in case Clemence should fail to execute such authority, and take such oath, he should, within the space of two months from the date of the award, pay to Templeman the further sum of 34l. And that the plaintiff Templeman, on performance, should deliver to the defendant the bond in which he was bound to Elizabeth Templeman, and that the plaintiff Lynch should execute a general release to the defendant.

THE objection on which the defendant principally rested his defence was, that Templeman not having been named in the condition of the submission bond, he was a stranger to the submission, and that therefore the award of payment to him was void: but it was answered, that he was so far from being a mere stranger, that he was in fact the person principally in contemplation of the submission; he was party to the bond, and the submission was of a thing, in which his interest was concerned. The wife of Lynch, before her marriage, was trustee for Templeman, and by the marriage the husband became the trustee; when, therefore, Templeman joined with Lynch in taking the submission bond, it was manifest he had agreed that the matters in controversy relative to the bond, taken by him in the name of Elizabeth Templeman, should be determined by the arbitrators, which amounted to a submission to their award. The arbitrators had, by their award, affirmed, that Templeman, as well as Lynch and Clemence, had submitted to them; the court would presume that it was so, and the parties to the submission bond were estopped to say the contrary: it was not absolutely

solutely necessary that the submission should appear by express words in the condition of the bond on which the suit was founded; it might appear by the bond made by Templeman to the defendant, for the performance of the award: but in the present case, without having recourse to extrinsic circumstances, the condition itself implied that Templeman was a party to it, and the omission of his name was evidently the mistake of the person who drew the condition, for it was to arbitrate *between the said parties, or either of them*, where the latter words, "or either of them," would be absurd and insignificant, if there were not two persons on one side. As to the award itself, that was good, for these reasons: the money payable on the bond to Elizabeth Templeman, in equity, belonged to Templeman the plaintiff, and, by the consent of his trustee, it was to be paid to him, which was in effect the same thing as if it had been awarded to be paid to Lynch; for had it been so, it must at last have been paid by Lynch to Templeman. Tender to Templeman, and refusal by him of the money awarded, would have been a good plea to an action of debt on the bond given to Elizabeth Templeman. By the payment to the plaintiff Templeman, the defendant's bond would be discharged as well as if the money had been paid to Lynch, and Lynch would also be discharged of his trust, which was for his benefit; so that each of the parties would have a suitable benefit by this award. (a)

THE condition of a submission bond recited, that a replevin was depending between Baily, one of the parties to the submission, and one Webb, who made conusance, as bailiff to Isaac Shelf, the other party, and Margaret his wife, and then stated, that the plaintiff Shelf, and the defendant Baily, were to stand to the award of arbitrators, on proviso, that the award were made concerning the premises, by a certain day. The award recited that Baily had brought a replevin, for taking his cattle, against Webb, to which Webb had made conusance, as bailiff to Shelf and Margaret his wife; and, after stating the proceedings in that action, awarded, "of and upon the premises, and of all matters in difference between the parties;" that all proceedings in the re-

plevin

(a) Lynch v. Clemence. 11 W. 3. Lutw. 571.

plevin should cease; that Baily should pay 7l. 10s. for the rent in arrear to Shelf, and 10l. costs; and that Shelf should give him a general release. In avoidance of this award, it was argued, that Webb was a stranger to the submission, and that by it the action between Baily and him was to cease; that so much was to be paid to Shelf, who was to give a release, which would not discharge Baily from the claim of Webb, who was intitled to costs, if the plaintiff in replevin did not proceed: it was answered, that *Shelf* was the party concerned in interest, and that a person might submit to an award for another.—And the court expressed the inclination of their opinion to be, that if one submitted on the behalf of another, his bond was forfeited if the stranger did not perform his part of the award; but that it did not appear here that Shelf undertook for Webb, or submitted on his behalf. (a) However, as in this case, Shelf was the principal in the avowry, and Webb only an agent, the award appears to be conclusive against Webb, and might have been set up as a defence to any claim of costs by him against Baily.

It has been seen, that a man is bound by an award to which he submits for another; (b) and that if an attorney, without the express authority of his principal, enter into a bond to a third person, under a condition to be void on performance of the award by the principal, otherwise to be in full force; this shall bind the attorney and not the principal. (c) It has also been said, that if a man authorize another on his behalf to refer a dispute between the principal and another, an award made in consequence of such a submission is binding on the principal alone. (d) But by a modern case, (e) it appears, that the latter assertion is true, only when the agent does not bind himself for the performance of the principal; for if he does, not only the principal who authorized him, but the agent himself is bound by the award.

THE bond was given by one George Fitzgerald, the defend-

(a) *Shelf v. Baily* in C. B. 8 Ann Comyns Rep. 183.

(b) Ante page 24.

(c) Ante page 26, 27.

(d) Page 25.

(e) *Cayhill v. Fitzgerald*. B. R. 17 G. 2. 1743. 1 Will. 28, 58.

ant, who was authorized by John Fitzgerald to submit all matters between the latter and Cayhill, the plaintiff. The condition reciting, that there were differences between John Fitzgerald and the plaintiff, concerning a certain debt, due from him to the plaintiff, on a bond for 800*l.* purported to be that, if the said George Fitzgerald, the obligor, for and on the behalf of the said John Fitzgerald, should perform such award as arbitrators should make, on or before a certain day, between the plaintiff and John Fitzgerald, then the bond should be void. The arbitrators awarded, that Geo. F. the defendant, should pay 298*l.* 9*s.* 6*d.* that the plaintiff should receive it in full of all demands, and that they should execute releases.

AMONG other objections to the award, this was taken, that it was not made between the parties to the submission; for that, instead of ordering G. F. the defendant, to pay, it ought to have ordered J. F. who was the real party to the submission.—The court seemed at first to think the award was bad, but afterwards Lee, C. J. delivered the opinion of the court in favour of the award: at first he said, that on reading Carthew's report of the case of Bacon and Dubarry, (*a*) he had been inclined to think the award was bad; but that having looked into Lord Raymond's report of the same case, and also seen a manuscript report of it, he was now clearly of opinion, that the award was good, and that the present case was not to be distinguished from that; for that it appeared by the pleadings in that case, (*b*) that had the award been general as in the present, and not "to the use of either of them," which confined it to the attorney, it would have been good to bind the principal. In the present, it appeared on the record, that the award was made "of and concerning the premises," in the condition of the bond, for it was expressly averred to be so, in the replication.

WHERE the stranger is only an instrument to the performance of the award, no objection shall be allowed on that account: as if it be, that one of the parties shall surrender his copyhold into the hands of two tenants of the manor, who shall present the surrender; this is good, though it be awarded, that the surren-
der

(*a*) Ante page 27.

(*b*) In 2 Salk.

der shall be made to strangers, who cannot be compelled to accept it, because they are only to be used as instruments. (*a*)

For the same reason, it is a good award, that one of the parties shall make a deed of feoffment, with a letter of attorney, to J. S. to make livery (*b*). Or that the defendant shall pay as the plaintiff and his attorney by a bill and oath shall make appear, for the attorney is only an instrument to ascertain the sum. (*c*)

As an award of a thing, out of the submission, cannot be enforced by an action at law; so, neither shall a man by such an award be precluded from claiming his right in equity.—This appears clearly, from the case of Warren and Warren, plaintiffs, and Green, Hurtnall, and others, defendants.—Mary Warren, the mother of the defendants, being possessed of the residue of a term for 99 years, in certain houses and grounds in Bristol, settled them on Hurtnall, one of the defendants, and others, in trust for herself, and afterwards to the use of the plaintiff John Warren, her son: she afterwards intermarried with the defendant Thomas Green, and then Hurtnall, contrary to his trust, delivered up the settlement, and the original lease to Green; Mary was likewise seized in fee for a moiety of other lands, and died so seized; and after her death, Green continued in possession of the lands and houses; some differences arising between him and John, one of the plaintiffs, concerning the sum of 8*l.* and other trifling matters, they were submitted to the arbitration of Hurtnall, both parties entering into bonds for that purpose: Hurtnall awarded, that all suits between them should cease, and that before the end of Trinity term following Warren should sufficiently convey and assure to Green, his heirs and assigns, all his right and title to the moiety of the said lands, and should procure his wife to join with him in a fine before the end of the said term, in order to perfect the conveyance; and should sufficiently grant, convey, surrender, and assign to Green, all his right to the houses in Bristol; and that, 'till such conveyance

(*a*) Coote v. Pooley. Rol. Arb. E. 7.

(*b*) Rol. Arb. E. 8.

(*c*) Rous v. Lun. 1 Keb. 569.

made, Green should continue in possession, and should pay to Warren some small sums, amounting to 200*l.* whereas the premises were worth more than 1000*l.* and that they should seal mutual releases to one another.

The plaintiff Warren exhibited his bill to have a re-conveyance of the premises in Bristol, and an account of the profits since the death of his mother, and to have the award set aside, as comprehending subjects not within the submission.

The court decreed, that Hurtnall and the other defendants, the trustees, should re-convey the premises; that Green should account for the profits, and that the bonds of submission should be brought before the master and cancelled. (*a*)

NEITHER shall an award affect the rights of persons not parties to the submission. Thomas Brown, on the day before his marriage with Mary his intended wife, entered into a bond to trustees for Mary, in the penalty of 10,000*l.* conditioned, that if Mary should survive him, he would leave her 6000*l.* to be paid at three payments within 18 months after his death; but that if he should purchase lands to a certain value, and assign the same, together with some other property, to her, then the bond should be void. After the marriage, the trustees delivered the bond to Mary, who locked it up in her cabinet; but the husband, or some one by his order, opened the cabinet, and took away the bond and cancelled it; and he never performed the condition with respect to the purchase of the land. Brown had several suits with the trustees, which were referred to arbitration; general releases were awarded between Brown and the trustees, but the bond was not concerned in the disputes, nor was any recompence made or intended to be made to the wife by the award in satisfaction of the bond.

A BILL being filed by the widow against the executors of Brown, and these, with other circumstances appearing in the cause, the court considering the award, and the releases given in consequence of it, to have no relation to the bond, decreed, that the widow should have the same satisfaction, and the same benefit

(*a*) John and Richard Warren v. Green, Hurtnal, et al. Ca. Temp. | fence of the decree, for the report is
Finch 141. This seems to be the el- | not accurate.

out of her husband's estate, as if the bond had not been cancelled, and the award had never existed. (a)

THE adherence to the rule, "that the award should not go beyond the submission," has not been so literally strict, as to overturn the award merely because the words might seem too comprehensive; but if it might reasonably be presumed that nothing was in reality awarded beyond the submission, it has in general been supported.

THUS, antiently, "where the submission was of all matters between the parties at the time of the submission, and it was awarded that one of them should release to the other all demands to a day subsequent," it was held that this was void, because a demand might have accrued since the day of the submission, which the arbitrator had no authority to order to be released. (b) Yet, if in the submission there was a clause running thus, "so that the award be made concerning the premises," or something equivalent, and if the award was made with reference to that clause, this should controul the construction of the award, and confine the operation of the awarded release to differences existing at the time of the submission. (c)

So, where the submission is of a *particular* difference, when there are other matters in controversy, though an award of a general release would have been void; yet the burthen of shewing the existence of these was thrown on the party objecting to the award on that account. (d)

THE submission was, "of all suits and controversies between the parties concerning the tythes of corn and hay in a certain parish. The arbitrator awarded, that the defendant should pay to the plaintiff 40*l.* before a certain day, in consideration of which the latter should permit all suits and controversies depending between the parties to cease, and that they should be no further pro-

(a) Mary Brown, widow, v. Will. Savage et al. executors of her husband. Ca. Temp. Finch 184. et vid. Id. 180, 441.

(b) Moor v. Bedel. Gouldsb. 91, 92, cited 10 Co. 131. 2. Jenk. 264. Rol. Arb. B. 4.

(c) Vanlore v. Tribb. Rol. Arb. 21. Vid. 6 Mod. 232.

(d) 2 Mod. 309. Vid. Rous v. Nun. 1 Sid. 154. Alablafter v. Clifford. Rol. Arb. B. 23. Vid. Hob. 190. Gossé v. Browne.

secuted. The plaintiff having set forth this award, averred, that there were not any other suits depending between them for the tythes of the parish. The defendant rejoined, that there were suits depending then between them, concerning a parcel of land in the same parish, but no controversy concerning the tythe. When the case first came before the court, they thought the award bad, as extending to subjects beyond the submission: on a further hearing, however, the plaintiff had judgment, and a writ of error being brought in the Exchequer chamber, the judgment was affirmed, that court being of opinion, that the order "that all suits should cease," should be confined to suits relating to the tythes, and void only for the residue. (a)

ANOTHER branch of the general rule, *Must not be of Parcel only of the Things submitted.* "that the award must be according to the submission," is, "that it must comprehend every thing submitted, and must not be of

parcel only. (b) The purpose of the parties in submitting is, to have a final determination of every matter comprehended within their submission: that purpose is not obtained when the award only comprehends a part.

THIS, however, must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the parties, beside what is comprehended in the award, the award will be good. As if the submission be of all actions real and personal, and the award be only of actions personal; it shall be presumed that no actions real were depending between the parties. (c)

So, it will be sufficient if the thing awarded necessarily includes the other things mentioned in the submission. As, where the submission was of the *right, title, and possession* of 20 acres of land, and the arbitrators awarded that one of the parties should enter into 10 acres, and have them to him and his heirs, and the

(a) Ingram v. Webb. 1 Rol. Rep. 362. 2 Rol. Rep. 192. Cro. Jac. 663.	39 H. 6. 11. b. semb. cont. Brooke Arb. 29.
(b) 19 H. 6. 6. Fhbt. Abr. 51. a.	(c) Vid. 8 Co. 98. 19 H. 6. 6. b. Rol. Arb. L. 5.

other should have the other 10 acres for term of his life; this deciding apparently only the possession, yet in substance comprehending the right and title, is a good award. (*a*)

AND where by a reference to something which the arbitrators suppose done, but which is in fact not done, it turns out, that of one particular point they have made no award, this shall not render the whole award void.

As where they awarded, that on one thing submitted to them the parties should perform the award made by former arbitrators, who had in fact made no award. (*b*)

So also, if the submission be of all the premises, or of any parcel of them, in this case the arbitrator may make an award of parcel only. (*c*)

IF the submission be of all matters between the parties, and the award be made of all except a bond, and of this the award be that it shall stand, the award is good for the whole; for the arbitrator is not bound to discharge the bond without cause, and it shall be presumed that there was no cause. (*d*)

THE condition of an arbitration bond was with a proviso that it should be made concerning the dilapidations of the parsonage of S. being and remaining in decay and ruin by the default and after the death of A. B. clerk, whose executor, one of the parties, was late parson there; and also of and upon all and singular actions, suits, quarrels, debates, and strifes, had, moved or depending in variance between the parties.

THE award was, that the defendant, the executor, before a certain day, should repair the dilapidations at his own costs; but, in the award, the arbitrator protested that he would not meddle with any other actions, &c. besides. It was objected, that by this protestation the arbitrator had disabled himself to judge between the parties; for that this differed from the case "of a simple submission, in words which, in their natural meaning, might ex-

(*a*) 19 H. 6. 6. Fhbt. Abr. 51.
a. Brooke 44, 45. Rol. Arb. 51. a.

(*b*) 39 H. 6. 9. b. Brooke Arb.
29.

(*c*) 39 H. 6. 11. b. Rol. Arb.
L. 6.

(*d*) H. 14 Jac. Berrie v. Perrin,
at Serjeant's Inn, judgment affirmed
on a writ of error. Cro. Jac. 400.
Bridgeman, 91. Rol. Arb. M. 2.
S. P. resolved in Sallows v. Girling.
Cro. Jac. 277.

tend to *two* things, and an award of *one* of them ;” for there, in favour of the award, it was to be presumed that no other matter was laid before the arbitrator but that on which he had decided ; but here it appeared, by the express protestation of the arbitrator himself, that there were other matters in dispute beside the dilapidations, and he had not awarded according to the submission by refusing to take cognizance of these. In the report of this case in Dyer, it does not appear whether the objection was considered as well founded, as it was not averred that any other matter was in reality in dispute beside the dilapidations, nor is any judgment there reported to have been given. (a)

BUT in another report of the same case judgment is said to have been given for the defendant, the award being void. (b) And on another occasion it was held clearly by the court, that if arbitrators award for one thing, and say that they will not meddle with the rest, all is void, because they have not pursued their authority. (c)

WITH respect to the award being void or not, when it is made only of part of the subjects comprehended within the submission, there is a distinction arising from the form of the submission itself, which runs through all the books. (d)

THE submission is sometimes general of all matters in difference between the parties, without specification of any particular subject of dispute. Sometimes it specifically enumerates the particulars.

BOTH forms are sometimes without any particular clause providing for the arbitrators deciding on the whole ; and sometimes, to each, such a conditional clause is added, which, from the first words of it, when all legal instruments were in Latin, is called the clause of *It quod*: the words running thus : “ So that the award be made ‘ *of and upon the premises*,’ before such a particular day.” But it is not absolutely necessary, that, to produce its proper effect, this clause should exactly run in these words :

(a) Dyer, 216, 217.

(b) Benl.

(c) Dist. Barnes v. Greenwell.
Cro. El. 858.

(d) Vid. Cro. Jac. 200, 354. Hob.

49. 4 Leon. 49. 2 Saund. 292.
2 Lev. 3. 2 Keb. 759. 3 Lev. 413.
Cro. Car. 383. 2 Vent. 242, 243.
Salk. 75. pl. 16. Lutw. 552.

“ of

"of and upon the premises" may be supplied by other words equivalent; "so as the *same* award be made and delivered by a particular day" admit of a similar construction, the "*same*" having a reference to every thing before mentioned. (a)

A PROVISIO, that the award be made on or before a certain day, implies a proviso that it be made of the premises, though that be not expressed, and therefore all the qualities necessary to constitute a good award, where the proviso is full, are equally necessary in the other case. (b)

AND where a provision is made for the appointment of an umpire, in case of a want of decision by the arbitrators, it is sufficient that the clause of *ita quod* be inserted with respect to the arbitrators, though it be not repeated with respect to the umpire; for the reference to the umpire is only an addition of time, and not the constitution of a distinct power. (c)

WHERE the submission is of certain things specifically named, with this provisional clause, the arbitrator ought to make his award of all, otherwise it will be void. (d)

BUT where the submission is general of all matters in difference between the parties, though there should happen to be many subjects of controversy between them, if only one be signified to the arbitrator, he may make his award of that; he is, in the language of Lord Coke, in the place of a judge, and his office is to determine according to what is alledged and proved. It is the business of the parties grieved, who know their own particular grievances, to signify their causes of controversy to the arbitrator; for he is a stranger, and cannot know any thing of their disputes but what is laid before him. If any other principle prevailed, many awards might be avoided, says the same author; for one might conceal a trespass committed, or other secret cause of action, which he had against the other, and so avoid the award, which

(a) Cro. El. 838. pl. 14. vid. Al. 52.

(b) Lee v. Elkin. 13 W. 3. Lutw. 202.

(c) 1 Keb. 791, 865. 1 Lev. 140.

(d) 8 Co. 98. Baspole's case. S. P. Hamond v. Hatch. Goldsb. 125. pl. 14. 19 H. 6. 6. Fhbt. Abr. 51. a. Rol. Arb. L. 9.

would counteract the very principle on which these domestic judgments are recognized by the law. (*a*)

AND if, in the case of such a general submission, an award concerning one thing only be made, it shall be presumed till the contrary be shewn, that nothing else was referred to the arbitrator. (*b*)

PENDING an action of trespass, the parties referred the matter to arbitration. The submission was, in general terms, of *all* actions, controversies, and suits between them: the award was in these words—"Whereas there has been a suit at law, between the parties, that has run to a great expence on both sides; and it being left to me to make an end of it, I determine that they shall each of them pay his own charges at law; and that the defendant pay the plaintiff five shillings for his making the first breach in the law." The defendant, by consent of the plaintiff and leave of the court, pleaded this award, in bar of the action; one objection made to it was, that the submission purported to be of several matters, and the award was of one; but the court held unanimously, that as it appeared, that this particular suit was depending between the parties, and the arbitrator had decided on it, and the parties had not desired to be heard on any more than this one; there was no probable presumption that any other subsisted between them (*c*)

AND notwithstanding the provisional clause inserted in a general submission, it shall not be presumed, that any other difference appeared between the parties than those included in the award, unless it be shewn by the party objecting to it on that account.—Thus, where the submission was of all matters depending to the 29th of January, "so that, &c." and the arbitrators reciting that several matters were depending on the 29th of January, awarded, "of and concerning the premises" of all matters to the 28th of January; the award was held good, because it did not appear that any matter was depending

(*a*) 8 Co. 98. b. cited Hob. 49.
Rol. Arb. l. 7. 8. Brownl. 63. 2 pt.
399.

(*b*) Vid. all these points adjudged.

Middleton v. Weeks. Cro. Jac. 200.

Ormlade v. Coke. Cro. Jac. 355.

(*c*) Vid. the Cobler's Award. 1
Bur. 274 et seq.

on the 29th which was not depending before the 28th; and because, without special matter shewn, it should be intended a good award, with the averment, that it was made "of and upon the premises. (a)

THE same determination has been given in many other similar cases, (b) and in one it was said by the court, that there was no occasion for an averment, that these were all the matters depending at the time of the submission; "now depending" could not be, unless they had been in suit before the 29th; because "a suit cannot be said to be begun and depending all on the same day."—I cannot, however, subscribe to the accuracy of this observation, nor can it at all apply to any other case, where the distance of time between that mentioned in the award, and the date of the submission is more than one day.

THOUGH the provisional clause be inserted in a general submission, yet it will be no objection to the award, that the arbitrator had notice of a demand of a certain sum by one party against the other, and that he made no award of that, if in other respects the award be good. Thus, where the award was, that the defendant should pay to the plaintiff several particular sums, on so many distinct accounts, and that on the payment of such sums, they should give to each other general releases. The defendant pleaded, that the plaintiff was indebted to him for fees and disbursements as an attorney in the sum of 4*l.* that before the award made, he gave notice of this demand to the arbitrator, and offered to make it appear to him, and prayed that he would allow him that in the award; but that the arbitrator made his award as set forth by the plaintiff, without any allowance made, or consideration had of the said 4*l.* notwithstanding the notice: but it was held, that this was no objection to the award, because the arbitrator was not bound to make the allowance, as he might consider it as not a just claim; he was the proper judge

(a) T. 7 Car. B. R. Ward v. Jac. 577. Ley v. Paynes. H. 15
Unwin. Rol. Arb. B. 24. Cro. Car. Jac. et eod. term. Maye v. Samuel.
216. Rol. Arb. M. 5. Hob. S. C. 258.
(b) Busfield v. Busfield. Cro.

whether it ought to be allowed or not, and he had given his judgment by ordering general releases. (*a*)

AN award of one particular thing, for the ending of a hundred matters in difference is sufficient: as, where the submission was of all matters in controversy, and the award taking notice of several matters, ordered the defendant to pay to the plaintiff four pounds, for arrearages of rent, and towards the repair of the house; this was held sufficient. (*b*)

IN the case of a submission of specific subjects of difference, if no condition be annexed that the award shall be made "of and concerning the premises," it is said the arbitrator may make his award of any of them, without considering the others. (*c*) This, however, appears to be a hard measure of justice, unless it be accompanied with the qualification allowed in the Roman law, even in the case of a general submission; by which, if one of the parties had omitted to assert any particular claim, and the arbitrator of course made his award without considering that demand, the party was not barred by the award, from afterwards enforcing the claim omitted, by a suit in the ordinary courts. (*d*) And indeed there is a case reported, in modern times, which, as far as a decision at *nisi prius*, reported by one whose authority is not the most respected in Westminster Hall, can be considered as an authority, directly contradicts the general principle here laid down. (*e*) This was an action of debt, on a bond conditioned for the performance of an award. At the trial, the Chief Justice is reported to have said, that the arbitrators were bound to make their award on all matters between the parties which had been laid before them, though there was no

(*a*) Birks v. Trippet. 1 Saund. 32, 33.

(*b*) Hopper v. Hacker. 1 Keb. 738. 1 Lev. 132, 133.

(*c*) 8 Co. 98. a. M. 5 Jac. Middleton v. Weeks. Rol. Arb. L. 2. 3. Dict. pr Maynard. 2 Vern. 100.

(*d*) De rebus controversiisque omnibus compromissum in arbitrum a Lucio Titio et Mævio Sempronio factum est, sed errore quædam species

in petitionem a Lucio Titio deductæ non sunt, nec arbiter de his quicquam pronunciavit: quæsitum est an species omiffæ peti possint? Respondi, peti posse nec pœnam ex compromisso committi; quod si maligne hoc fecit, petere quidem potest, sed pœnæ subjugabitur.—Ff. l. 4. t. 8. f. 43.

(*e*) King v. Hammerton. 2 Geo. 2. 1 Barnard. K. B. 316.

provisional clause of "*ita quod*." And the arbitrators having overlooked some matters that had been laid before them in the present case, a verdict was given for the defendant.

As it is of several particular things, says Lord Coke, (a) so it is of several particular persons, and therefore, if two on one side, and one on the other submit, the arbitrator may make an award between one of the two of the one part, and the other of the other part, and it will be good. (b)

THEREFORE where the submission was by two plaintiffs on one side, and defendant and his wife of the other, of all matters and controversies between them, "or any of them;" the award was held good, though nothing was awarded concerning the defendant's wife, on account of the words, "between them, or any of them." (c)

So, if A and B on one side, and C on the other, submit to the award of J. S. of all matters between them; J. S. may make an award of any matter between A alone and C, for the submission shall be taken distributively, and perhaps there was no matter between B and C. (d)

A SUBMISSION of all matters between the parties, when there are more than one on one side, is the same as a submission of all matters between the parties, or either of them; and therefore, on such a submission, an award of a sum to be paid by one of the two to the single party, is good; though it was objected, that the submission must be understood of joint demands, and that therefore an award of a separate debt was not within it. (e)

BUT if, in such a case, it appear in the submission, that there were differences between the person on one side, and all the parties on the other, and the submission be with the provisional clause; the award must comprehend all the parties, because the submission is under a condition that it shall do so, (f)

(a) 8 Co. 98. a.

(b) Vid. 2 R. 3. 18. Brooke 44, cited Plowd. 289. 1 Keb. 885. contra. 1 Lev. 140. Bean v. Newbury. 16 Car. 2 B. R.

(c) Hardres 399.

(d) Arnold v. Pole. Rol. Arb.

D. 5. Carter v. Carter. 1 Vern. 259.

(e) Althelstone v. Mooneet Willis. Comyns 547.

(f) Harris v. Paynter. Rol. Arb. O. 8. cited Lutw. 1628.

THIS distinction, "with respect to the submission being conditional or not," is said not to hold in the case of a reference by a rule by consent of parties in a court of equity; for there, it is said, unless the award comprehend all matters referred, it will be set aside, as not being a determination pursuant to the terms of the reference. (a) Perhaps something like a reason may be given for this apparent difference in the doctrine held on the two different sides of the Hall.—And perhaps the difference is more in appearance than in reality.—In the conditions of submission bonds, though there may in fact be but one subject of dispute between the parties, yet a great variety of general and comprehensive words is frequently inserted, which would, if in fact there were ever so many subjects referred, include them all; but the insertion of which does not imply the existence of more than one. The courts of law, therefore, do wisely in imposing, on the party objecting to the award for this cause, the burthen of shewing, that in fact a greater number of things were laid before the arbitrator, than he has determined: but when the reference is by rule of a court of equity, greater preciseness is probably observed in the description of the subjects referred, and, by omitting to decide on any, the arbitrator does not fulfil the intention of the court, which is to have as final a determination by his award, as would have been made by a decree.

Or if the rule be drawn up in general terms, it cannot be less necessary in a court of equity than in a court of law, for the party objecting to the award, because it is less comprehensive than it ought to have been, to shew accurately that something was in reality in dispute which is not comprehended in the award.

If an award be of any thing which is
Must not be of any against law, it is void, and the parties not
Thing against Law. bound to perform it. (b) As by the Roman
 law no penalty was incurred by non performance of any thing awarded which was dishonourable. (c)

(a) *Hide v. Petit.* 1 Ca. Ch. 186.
Colwel v. Child. Id. 87.

(b) 19 E. 4. 1. Rol. Arb. G.

(c) Non debent autem obtemperare

litigatores, si arbiter aliquid non honestum jussit. Ff. l. 4. t. 8. f. 21. n. 7.

AND it was once held, that an award of a recompence for an injury, for which no damages are recoverable at law, was void: thus an award, "that the defendant should pay the costs of a suit, instituted against him for words," was held to be void, if the words were not actionable; and for that reason it was adjudged, that the words ought to appear in the award, that the court might determine whether they were actionable or not. (a)

BUT this has since been denied to be law, and it has been held, that the plaintiff is not bound to shew that there was cause of action, that being left to the arbitrators to determine, who have power to award damages, though, in point of law, there was no cause of action, because the parties have made the arbitrators their judges. (b)

AN award of a thing which it is not physically or morally in the power of the party to perform, is void; as that he shall deliver up a deed which is in the custody or power of a person over whom he has no controul: (c) that he shall procure a stranger to be bound with him for the payment of a sum of money; for he cannot compel a stranger to be bound for him: or that he shall procure the justices of the Common Pleas to sit, in order that he may levy a fine: (d) or that he shall procure the lord of a manor to grant a copyhold, or a stranger to make a release or confirmation of an estate; (e) or to pay a sum of money at a day which was past at the time of the award; (f) but in this case he ought to pay the money, the payment being the essence of the award, and not the payment on a particular day: or that he shall enter into an obligation to the other immediately after the award; for some time is necessary. (g) Yet perhaps at the present day "immediately" would be construed "within a reasonable time." An award, however, that the one party shall infeoff the other in an acre of land, and im-

(a). Vid. 1 Sid. 12.

(b) Hanson v. Liversedge. 2 W. and Mary. 2 Vent. 243.

(c) 12 Mod. 585.

(d) 19 Ed. 41. 1. Rol. Arb. F. 2.

3. 4.

(e) 28 H. 6. Mo. 3. pl. 3.

(f) 8 Ed. 4. 1. Rol. B. 17.

(g) 18 Ed. 4. 21. Rol. Arb. E.

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mediately after deliver up the title deeds; or enter into a bond, and immediately after pay the money, would be good, because neither of them is impossible. (a)

BUT an award, that the defendant shall be bound with sureties, such as the plaintiff shall approve, is void; for it may be impossible to force the approbation of the plaintiff. (b)

So, we are told, an award is void which orders the party to do something which has been already done, or which, if it were done, would not be effectual to answer the purpose intended: as if it be awarded, that A shall release to B the surety of the peace which he has against him in the King's Bench, when, in fact, before that, B has purchased a superseas out of Chancery, directed to the justices to discharge the sureties in the King's Bench, because he had found sureties in Chancery, and the justices has accordingly discharged them.—Or if it be awarded, that he shall release his suit against B, when in fact he had no suit against him; or that he shall release all his right in a certain manor, when in fact there is no such manor, or he has no right in it. (c)

AND in general, in this respect, a distinction is made between the case of a bond, and that of an award; for if a man bind himself to do a thing which it is not in his power to do, it is reckoned his own folly, and he forfeits his bond by non performance: but the duty of an arbitrator is to judge reasonably and impartially between the parties, and he departs from that principle, when he orders any thing which it is not physically or morally in the power of the parties to do. (d)

BUT it is no objection to the award, that it is difficult for the party to perform it, from the accidental narrowness of his circumstances; as if it be to pay 20l. when he is not worth a groat, or to give 20 tons of wine when he has not one. (e)

AND, if the party's doing that which is awarded will have

(a) 18 Ed. 4. 21. Rol. Arb. E. II. 2.

(b) 3 Mod. 272, 273.

(c) 21 Ed. 4. 38. 39. Br. Arb. 40.

(d) 19 Ed. 4. 1. Rol. Arb. F. 2. 3.

(e) Id. ibid. cont. 18 Ed. 4. 1. Rol. Arb. E. II. 2. F. 2.

weight with the court to give effect to it, he ought to do it; as in the case of releasing the other from sureties of the peace, where he is bound to keep the peace towards the releasor and all the king's subjects; though, by his release, he cannot discharge the party so bound, because every subject has an interest in the recognizance: (a) yet he ought to release, because his release shewn to the court will be an inducement to them to discharge the recognizance. (b)

In the case too, of an award that one of the parties shall procure a stranger to do a thing, a distinction is taken between the case, where he has no power over the stranger to compel him, and that where he has power, either by the common law, or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good; as if a stranger to the submission be seized to the use of one of the parties, and the arbitrator award, that the latter shall cause the feoffee to uses to give a release to the other who is in possession; this is good, because the *cestuy que use* has such interest and power over the feoffee, that by subpoena out of Chancery he can compel him to release. (c)

So, if it be awarded that one shall pay a sum of money to the other, and that in consideration of that he shall acquit him of a bond in which they are both bound to a third person; here, though a third person be in some measure to concur, yet it is held, that the award is good; for if the penalty of the bond be not incurred, he may discharge the principal sum at the day; if the penalty be forfeited, he may pay, and compel the obligee in equity to deliver up the bond. (d) The same observation applies to an award that one of the parties shall discharge the other of his undertaking to pay a debt to a third person. (e) On the same principle, it is said, that, admitting no objection will hold to an award of a discontinuance, or of a nonsuit, on ac-

(a) 21 Ed. 4. 40, 41..

(b) 2 Hawk. Leach. 257. Quz. et vid. as to the release of sureties of the peace. Jenk. 136.

(c) 17 Ed. 4. 5. b. Rol. Arb. F. 1.

(d) Darsey v. Clipsham. March. 18. 1 Rol. Arb. page 248. n. 11. vid. ante page.

(e) Becket v. Taylor. 1 Mod. 9.

count of its not being final, such an award is good ; though there must be an act of the court, for it is in the power of the party, says Rolle, to make default, or to deny the action. (a)

As an award must not be of a thing impossible, so neither must it be of a thing unreasonable. Therefore an award, that the one

party shall serve the other for any period of time, is void ; for it is unreasonable, as being contrary to the first principles of civil liberty. (b) On the same principle, an award is void which orders the party to do a thing, in the performance of which he may subject himself to an action from another : thus, in the times of ancient nicety, an award was considered as void, which ordered the party to pay money "in" the house of a stranger, because he could not enter the house of a stranger without committing a trespass. But, that he should pay the money "at" or "near" the house, was held good, because he might go to the house without entering it and committing a trespass : (c) unless the owner of the house has land adjoining to it, so that the party cannot come to the house without trespassing on the land, for then the award was considered as void. (d) But even in those times, if the house at which the payment was to be made was a common inn, the award was considered more favourably. (e) And now an award to pay at or in the house receives the same construction, and is taken to imply a licence to go to the house ; (f) especially, if it be in the house of the arbitrator himself, for there a licence shall be presumed. (g) Or at least the party may pay at the door of the house, if he cannot obtain permission of the master to pay it in the house. (h) It is on the principle of being unreasonable, that an award, "that one of the parties shall pay only part of a debt due," has been considered as void, if it appeared on the

(a) Rol. Arb. F. 5. 6.

(b) 9 E. 4. 44. Rol. Arb. B. 12.

(c) Rol. Arb. E. 2. where many cases are cited. Linsey v. Ashton. 2 Bulst. 39. Anon. 1 Keb. 92. Rol. Arb. F. 10. 1 Rol. Rep. 6.

(d) Taverner v. Skingley. Rol. Arb. E. 3.

(e) S. C. Cro. Car. 226.

(f) Alley v. Cox. 27 Car. 2. 3 Keb. 479.

(g) Freem. 205.

(h) Holland v. Helwis. 3 Lev. 153.

face of the award, that more was really due. (*a*) But where it does not appear by the award, that a larger sum is really due, but that it is only in demand, an award of a less sum is good. And if the submission be of all matters in difference, though the arbitrator do not directly take notice of any other matter but the demand of the larger sum, it shall be presumed, in support of the award, that the arbitrator saw, upon the whole, that nothing more was due than he has given. Thus, where, to debt on bond for performance of an award, the defendant pleaded "no award made;" and the plaintiff in reply set forth an award, in which the arbitrators took notice of 72*l.* being in controversy for rent due, and awarded 50*l.* in full satisfaction and general releases to be given; but it did not appear by the award, that any other matter had been in controversy, though the submission was general. The court were of opinion that the award was good; and further remarked, that it was singular the objection should come from the defendant, in whose favour the award was; for by his objection he insisted on paying 72*l.* instead of 50*l.* The strength of the objection, however, must have been, that the award for a less sum was void, because payment of the less sum in pursuance of it, if the award was not good, would not be a bar to the plaintiff in another action for the original debt. (*b*)

ON the same principle, of being unjust and unreasonable, it has been held, that, where the question in dispute was the taking away of the plaintiff's goods, an award "that he should have part of them returned, and that the defendant should retain the rest," is void. (*c*)—But if it had appeared that there was a dispute about the property of the goods, an award "that the plaintiff should have part, and the defendant should retain the rest," might have been sustained; for then it must have been understood, that the arbitrator adjudged the property of so much as he ordered to be retained, to have been in the defendant.

(*a*) Cont. 45 Ed. 3. 16. where it is by simple contract. Br. 44. b. acc. Rol. Arb. J. 4.

(*b*) Godfrey v. Godfrey. 2 Mod. 304.

(*c*) Cont. M. 45 E. 3. 16. Br. 44. b. Acc. Rol. Arb. J. 5.

Must be advantageous. AN award must not be of a thing which is merely nugatory, without any advantage to the parties; therefore an award that one of them shall go to Rome, or to St. Paul's, is void, for it can be of no service to the other. (a)

So, if a man and a woman submit to arbitration, and it be awarded that they shall intermarry, this is not binding; for one reason, among others, that it cannot be presumed to be advantageous to them. (b) So, it is not a good award that one shall give a release to the other of land in satisfaction of an action, if he to whom the release is to be made has nothing in the land at the time, for that can be of no service to him. But, in such a case, if he to whom the release is to be made be seised of the land, such an award will be good, though he who is to give the release has no right in it; for it is an advantage to have such a release, to bar the releasor if he should afterwards pretend to have title to the land. So, if before submission, one of the parties had executed a release made in favour of the other, but had retained it in his own hands, and then, on submission of all matters, the arbitrator had awarded that he should deliver up all the evidences concerning the land, in satisfaction of a certain action; if he had not delivered the release, this would have been a breach of the award; the award is good, though it be only to give the party his own evidences, it being an advantage to him to have them without an action. (c)

MUTUAL releases are advantageous, and therefore an award of them is good; and the condition of a bond to stand to an award will be broken, by not giving them, though there be no other means of compelling performance than by an action on the bond. (d)

BUT the courts formerly went further than merely to require that an award should be advantageous; they required that it should give something which appeared expressly to be a recompence to the plaintiff against whom it was pleaded. On this

(a) 9 Ed. 4. 44. Rol. Arb. J. 11.		9 E. 4. 44. a. b. Rol. Arb. J. 10,
(b) Id. ibid. et Rol. Arb. J. 10.		11, 12, 13, 15.
(c) Vid. all these points adjudged,		(d) Id. ibid. et vid. Freem. 51.

principle, it is held in many places, (a) that an award that each party shall be quit against the other of the trespasses committed on one another, because these trespasses were equal, is not a bar to an action by one of them for the original trespasses, because, say the books, one must have a recompence. In other places, (b) however, such an award is held to be good, as indeed there seems no rational objection to it. On the principle of a recompence being necessary, an award "that the plaintiff shall have his goods again, which had been taken by the defendant," it is said, is not good, because it gives no satisfaction for the taking and detention; (c) but, that if it be added that they shall be carried to such a place at the expence of the defendant, this is a satisfaction: it is, however, no more a recompence for the taking and detention, than the award without the addition of this clause.

EVEN in those times it was allowed, that an award, that "whereas each is indebted to the other in 40s. the one shall go quit against the other is good, because it is a sufficient satisfaction." (d)

IF on a submission of a trespass, it is said, the arbitrator award, that if the defendant will swear that he is not guilty, he shall go quit, and he accordingly swear, this is not a good award, and cannot be pleaded to an action of trespass, because, says the book, (e) nothing is awarded to be paid; or rather, says Rolle, (f) it cannot be intended to be the same trespass of which he waged his law.

As the intention of parties in submitting their disputes to arbitration, is to have something as- *Must be certain.*certained which was uncertain before, it is a general rule that the award ought to be so plainly expressed, that there may be no uncertainty in what manner the parties are to put it in execution, but that they may certainly know what it

(a) 43 Ed. 3. 28. b. 29. a. Brooke; 44. b. Rol. Arb. J. 1. 21 H. 6. 22 H. 6. 39. a. 9 Ed. 4. 44. Fhbt. 51. b.
(b) 10 H. 6. 14. Br. 43. 19 Ed. 4. 8. Br. 38. Rol. Arb. J. 7.

(c) 12 H. 7. 14, 15. Vid. 45 Ed. 3. 16. Rol. Arb. J. 3. Br. 32.
(d) 19 H. 6. 37. b. Rol. Arb. J. 6.
(e) 46 Ed. 3. 17. Fhbt. 52. b. Brooke, 44. b. vid. Rol. Arb. 1. 2.
(f) Rol. Arb. X. 7.

is they are ordered to do. It is to no purpose, says the civil law, (a) that the arbitrator should pronounce an uncertain award; and the English law has, in this respect, adopted the same language. (b) Therefore an award, "that one of the parties shall pay the other for certain task work and days work, without mentioning the sum," is void. (c)

THE plaintiff and defendant having certain disputes concerning a piece of land, submitted them to arbitration. The arbitrator awarded, amongst other things, that the defendant should enter into a bond to the plaintiff, that the plaintiff and his wife should enjoy the land; this was held to be void, because the arbitrator had fixed no certain sum for the penalty of the bond; and there was no means by which the sum could be ascertained; for it was held, that this did not resemble the case of a covenant by the party himself, to enter into a bond for the enjoyment of land, in which, if no sum be expressed in the covenant, it is implied that the penalty shall be equal to the amount of the land. (d)

TWO submitted all matters in controversy between them, and it was awarded that the one should pay to J. S. the one half, and the other the other half of a certain debt due to J. S. by two strangers, who were bound to J. S. at the request of the two submittants; though the sum in which the two strangers were bound was averred in the plea in which this award was pleaded, yet two justices against one (e) held the award was bad, for uncertainty in not having mentioned the sum. But one (f) of the two thought that this might have been aided, by an averment that the two strangers were bound to J. S. in no other obligation but this. (g)

(a) Pomponius ait, inutiliter arbitrum incertam sententiam dicere; ut puta, quantum ei debes redde, divisioni vestre fieri placet. pro ea parte, quam creditoribus tuis solvisti, accipe. *Pf. l. 4. t. 8. f. 21. n. 3.*

(b) 19 Ed. 3. 12. 5 Co. 77. b. 78. a.

(c) *Pepe v. Brett.* 2 Saund. 292. 293.

(d) *Sutton's case.* 9 Co. 77. 78. Rol. Arb. Q. 1. 4. Cro. El. 432. pl. 40. Mo. 359. pl. 489.

(e) *Doderidge and Houghton, Montague contra.*

(f) *Houghton.*

(g) *Gray v. Gray.* Rol. Arb. Q. 2. 3. Cro. Jac. 522. Godb. 275.

THE submission was "of all controversies concerning the right, title, and possession of 280 acres of land, called *Kelstorne Linge*; it was awarded, that in the *wight* lands of the vill of Kelstorne, the one should have the brakes growing there during his life, paying to the other 2s. per annum, but in the award no name was given to the land where the brakes grew; and for this reason the award was held to be void for uncertainty, nor would the court admit the aid of an averment, that the land where the brakes grew "was the said land called Kelstorne Linge in the submission, and no other nor diverse;" because they said they would not expound the intent of the arbitrators. (a)

THE condition of a bond being to perform the award of J. S. made between A. and B. of all controversies and demands between them, it was awarded, "of and concerning the premises," that A. should permit B. to enjoy certain leases of certain lands then in his possession, which were the lands of W. S. and then the inheritance of A.—B. paying the rents, and performing the covenants in the leases, and that B. should pay the *arrears* of rent due to A. after his purchase: notwithstanding an averment that there were two shillings of the arrears of rent then due, the award, as to the payment of the arrears, was held void for uncertainty, because it did not appear by the award, at *what* time after the purchase, the rent became due; for that B. the lessee, could not know at what time A. the plaintiff, purchased the reversion of W. S. nor had he any means of knowing it, unless A. or W. S. would inform him, which he could not compel them to do. (b)

PERHAPS, in the three last cases, the courts appear to have been abundantly nice; the same observation does not apply in an equal degree to some of those which follow.

TO an action on the case for the value of a quantity of malt, the defendant pleaded a submission to arbitration, and an award that he should pay to the plaintiff so much for each quarter as a quarter of malt was then *sold* for; the award was held to be void

(a) El. 242. 52. per curiam. Rol. Arb. Q. 5.

(b) *Massey v. Aubrey*, after verdict for the plaintiff. Rol. Arb. Q. 9.

for uncertainty, because it was not mentioned in what place the price was to be taken, and perhaps in one market it might be sold for a greater price than in another. (a)

AN award, "that the defendant shall deliver certain goods particularly named, and three boxes, and *several* books, without naming the books," is liable to the same objection of uncertainty: the books should have been particularly described, unless it had been said that the books were within the boxes, by which they would have been sufficiently ascertained. (b) So, an award, "that one of the parties shall deliver up to the other a certain writing obligatory, or a certain bill obligatory which he had before," is altogether uncertain, for it does not say of what sum, nor of what penalty the bond is, nor of whom it was obtained. (c)

THE same thing has been said of an award "that one of the parties should give security for the payment of a sum of money," either in one gross sum, or at different specific times, or annually for life; because, it is said, he cannot tell what kind of security is meant, whether by bond or otherwise. (d)

IT was awarded, that "one party should pay a certain sum to the other, by different payments at several days, the last of which payments should be two years after the award, and that on the last payment, the payee should give a release of all actions to the day of the *date* of the *release*"; it was much debated, whether the objection of uncertainty should prevail against this award. The judges who argued in favour of the exception, and who composed the majority, (e) argued in this way: It is uncertain what the date of the release was intended to be; if it be on the day of the last payment, the award of the release itself is void, because many causes of action may have accrued since the time of the submission; and if it must be left to the election of the party himself to give such a release as will be good, that is, with a date at the day of the

(a) Hurst v. Bambridge. Rol. Arb. Q. 7.

(b) Cockson v. Ogle. 13 W. 3. Lutw. 550.

(c) Bedam v. Clerkson. 1 Ld. Raym. 124.

(d) Duport v. Wildgoose. 2 Bulstr. 260. Thynne v. Rigby. Cro. Jac. 314. Tipping v. Smith. 2 Str. 1024.

(e) Coke et Doderidge.

submission,

submission, he may elect to give it any other date, as before the submission, which would not be sufficient.—The judge who argued in favour of the award (*a*) said, it must be taken to be such a release as would be good, if expressly awarded, and then it must be antedated to the time of the submission, and the antedate could deceive nobody. (*b*)—In such a case, the judgment of a court would, at this day, probably coincide with the latter opinion.

If that, to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail.

ON a submission by bond, "the condition of which recited several differences between the plaintiff and the defendant concerning a piece of ground situated south of the plaintiff's house, adjoining to the river Thames, and used as a wharf, and the erection of several piles of boards and scaffolds on it, of which the plaintiff complained as being a nuisance to his house;" an award was made, adjudging that the defendant *should enjoy* the piece of ground as a wharf, and that the scaffolds *should* be pulled down and removed. An action being brought on the bond, and on the plea of "no award," this being set forth by the plaintiff, and a breach assigned in the defendant's not having pulled down the piles of boards and scaffolds, the defendant demurred to it as wanting certainty, because it did not order by *whom* they should be pulled down; and it was argued, that it did not appear on the face of the award that the land belonged to the defendant, so that he could go upon it to pull down the nuisance without being a trespassor; for it was only ordered, that he should use the ground as a wharf, which rather imported that it was before disputed whether it was his property or not; and the award, that he should use it as a wharf, did not decide it to be his now: it only gave him a liberty of wharfage: and if it were admitted to be his ground, yet the plaintiff might abate it if it were a nuisance; every nuisance being abateable by him to

(*a*) Houghton.

(*b*) Lumley v. Hutton. 1 Rol. Rep. 271.

whom it is one; and if it were in fact no nuisance, yet the arbitrators, by awarding that the plaintiff should pull it down, might have enabled him to do it without being a trespasser; and it being left indefinite, whether the plaintiff or defendant should pull it down, the award was void for uncertainty. If any one be ready to exclaim that this mode of reasoning is too technical and puerile to have seriously attracted the attention of a court, let him treat it with more respect when he is told, that it is the reasoning of Lord Chief Justice Holt.—It received, however, this answer from the other three judges, (a) that the ground must necessarily be considered as belonging to the defendant; for it could not be supposed that the arbitrators would have awarded that he should use it as a wharf, if they had not considered it to have been his ground, and by declaring the erection of the deals and scaffolding to be a nuisance, and ordering it to be pulled down, they could only mean that it should be pulled down by him on whose ground it was erected. The case was the same as if a debtor or a creditor submitted to an award, and the arbitrators should award that the debt should be paid, or that it should be released; where it was manifest that it must be paid by the debtor, or released by the creditor. And it was compared to a case which had occurred in the reign of Edward the fourth; (b) where the condition of an obligation was, that the great bell of Mildon Hall should be carried to the house of the obligee in N, at the costs of the men of M, and there weighed and melted down; and the obligee should make of it a tenor, &c: though it was not said who should weigh the bell, yet it was adjudged that the obligee, who was a brazier, should weigh it, because it belonged to his occupation to do it. A writ of error, however, was brought on the judgment, which was in favour of the plaintiff, in the Exchequer Chamber, but before argument the parties agreed.

It was held, in the same case, that where there was no date to the award, it should be taken as dated from the day of the delivery, and that if any thing was ordered to be done at a cer-

(a) Powell, Powis, and Gould. } *Barnes*. 6 Mod. 224. But more
(b) 9 Ed. 4. 3. b. *Arnote v.* fully reported in 2 *Ld. Raym.* 1076.

tain time after the date, that time should be reckoned from the delivery, which might be ascertained by averment; and, in this case, where the scaffolding was ordered to be removed within fifty-eight days from the date of the award, which in truth had no date expressed, it was held that the time should be reckoned from the 9th of October, that being the day on which it was averred in the replication to have been delivered to the parties.

An award, "that one of the parties shall quit the other of a bond of 200*l.* or "thereabout," in which they were bound to B, for payment of 105*l.* or "thereabout," is sufficiently certain; for being of a bond given to a particular person, and with a penalty, and for the payment of a sum nearly ascertained, it shall not be presumed that there are any more than one which will answer the description in all these respects. (a)

An award, "that the one shall seal and deliver a demise to the other, or his assigns," is certain enough, it shall be understood, "to himself." (b)

An award, "that the plaintiff shall pay the defendant a certain sum on a particular day, and that then the defendant shall re-assign the land mortgaged to him by the plaintiff," is sufficiently certain, though it do not say for what term the reassignment shall be, whether for years, life, or fee; it shall be understood to be for the whole interest mortgaged. (c)

WHERE the submission was of all controversies, respecting a voyage, and it was awarded that, one should pay his part of the expences of the voyage, and allow, on account, his proportion of the loss which should happen to the ship during the voyage; this was held good, because the expences and the loss might be ascertained by calculation. (d)

"To pay the charges of a suit" is sufficient, for these may be ascertained by the attorney's bill. (e) So, "that the one shall pay to the other all such moneys as he had expended about the prosecution of a suit;" for that may be ascertained by shewing

(a) *Barley v. Clipham* on demurrer. Rol. Arb. Q. 8.

(b) 1 Keb. 346.

(c) *Rosse v. Hodges*. 1 Lord Raym. 234.

(d) *Beale v. Beale* on demurrer. Rol. Arb. H. 14.

(e) *Cro. Car.* 323.

what was in fact laid out. (a) So, "that the defendant shall pay as the plaintiff and his attorney, by a bill and oath shall make appear. (b)

So it might be supposed, an award between executors, "that the one should pay the testator's charges, debts, &c. in the Spiritual Court, as far as his assets went," would be good, because both the charges and the assets might be ascertained. (c)

So, it might be supposed, "an award of a sum, provided the party to whom it is awarded make affidavit of it before a magistrate," might be supported; but an award that he shall make such an affidavit as the other party shall require, is bad for the uncertainty of what affidavit he will require. (d)

It is no objection to an award, that it is conditional, as that one of the parties shall enjoy a house for three years and a half, and shall pay his rent every half year; and that if he fail in payment, the award for the enjoyment of the house shall be void. (e) So that he shall pay the other 10l. on condition that each shall acquit the other; for it shall be taken as a positive injunction that they shall acquit one another. (f)

So it may be made with a penalty, to attach on the non-performance of a preceding part; as to pay 12l. on two several days, and on default of payment the first day, to pay the whole 12l. immediately after. (g)

AND, where it is left to a subsequent event to ascertain precisely the thing awarded, it will be sufficient if that event must necessarily happen; as if the submission be with respect to a way leading to a house, and the award be, that the one shall give a bond of 300l. to the other, payable at three years' end; and in case the way be taken away, then that he shall pay loss by a certain sum, and if not, a certain sum more. (h)

(a) Hanson v. Liversedge. 2 W. and M. 2 Vent. 242.

(b) Rous v. Lun. 1 Keb. 569. et vid. acc. Linfield v. Ferne. 3 Lev. 38 et ante page 88.

(c) Semb. cont. Messenger v. Freeman. 3 Keb. 508.

(d) Backwell v. Knipe. 3 Keb. 293.

(e) Furrer and Bond v. Prowd. Cro. Jac. 423.

(f) Linfield v. Ferne. 3 Lev. 38.

(g) Kockill v. Wetherel. 2 Keb. 838.

(h) Collet v. Powell. 2 Keb. 670.

AN award in the alternative, that the party shall do one thing or another, is not subject to the objection for uncertainty; for when he has done one of the things he has performed the award; as if the award be, that he shall deliver up to the other party a certain deed, or pay him 50*l.* this is sufficiently certain; and such an award in the alternative seems to be the best mode of compelling a party to exert himself to procure the performance of what is not strictly within his own power; as in the case before mentioned, if the deed were in the custody or possession of another over whom he had no controul, the award would be void, if it simply ordered that he should deliver up the deed, because it might not be in his power to obtain it from the person, in whose possession it was: but the alternative of delivering the deed, or paying 50*l.* will be a motive for him to use his endeavours to have the deed delivered up; and if he cannot, the 50*l.* will be some sort of recompence to the other for the want of it: perhaps, in justice, the other is intitled to have the deed, and it is withheld from him in consequence of some misconduct of the first; it is therefore but justice, that, if he cannot have the deed itself, he should have a penalty equivalent to the damage he may sustain by the loss of it. (a)

LORD Chief Justice Coke is said to have applauded the wisdom of Chief Baron Manwood, in adopting this expedient of an alternative award, to enforce the performance of something, for which, had it been awarded simply, the award, according to some rules of construction, would have been void.

No objection can be taken to an award for want of certainty, because it appoints no time or place for the payment of a sum of money, though it be in the power of the arbitrator to appoint a time for payment, or for doing any collateral act; because the award shall have a reasonable construction; the party shall have a reasonable time to pay the money; a demand within a reasonable time shall be sufficient to entitle the opposite party to recover: and the place is perfectly immaterial. (b) In

(a) Vid. *Lee v. Elkins.* 12 Mod. 585, 586. *Lutw.* 545.

(b) 2 *Brownl.* 311. 1 *Keb.* 92.

et vid. *Philips v. Knightly.* Str. 903.
1 *Barnard.* 84. 151. 463.

this respect the English law exactly corresponds with the civil. (a)

When Uncertainty may be helped by an Averment is pleading. An averment, in some cases, may be admitted to support an award which has an appearance of being uncertain. (b) Thus, wherever from the nature of the thing, the award may be ascertained by a reference to something else, there an averment will help it, as if it be, "to pay the money expended in a certain suit," an averment "that so much was expended," will support it. (c)

So, where the description of a matter in dispute, is not exactly the same in the award as it is in the submission, an averment in pleading "that the thing so differently described, is the same thing," will be sufficient to support the award: thus, where the submission was concerning an inclosure between *Barton Down* and *North Down*, and the award purported to be of an inclosure, between the *defendant's* down and the down of *I. S.* it seems to have been admitted, an averment "that the inclosure mentioned in the award, was the same with that mentioned in the submission," would have supported the award: but for want of such an averment, the plaintiff failed in his action. (d)

BUT if there be no means by which the thing, uncertainly awarded, can be reasonably ascertained, no averment of the party will make it good.—Thus, if it be awarded "that the one party shall pay to the other so much money as shall in conscience be due," such an award cannot be supported by an averment, "that any particular sum is due in conscience." It was the express business of the arbitrator to ascertain the sum. (e)

So, an award, "that the defendant shall pay the plaintiff for

(a) *Solutioni diem posse statuere arbitrum puto: et ita et Trebatius videtur sentire. Ff. l. 4. t. 8. f. 21. n. 2. Intra quantum autem temporis, nisi detur quod arbiter jusserit, committatur stipulatio, videndum est. Et, si quidem dies adjectus not sit, Celsus scribit, inesse quoddam modicum tempus: quod ubi præterierit, poena statim peti potest et tamen si dederit ante acceptum ju-*

dicium, agi ex stipulatu non poterit, n. 12.

(b) *Dict. per Gould J. 1 Lord Raym. 612.*

(c) *Vide ante page 135.*

(d) *Withers v. Drew. Cro. El. 676. pl. 5.*

(e) *Watson v. Watson. Sty. 23. T. 3. Car. B. R.*

certain task work, and days work, without fixing a value," cannot be aided by an averment, "that the work was worth so much and no more. (a)

WHERE it does not appear from the award itself, that it was made "of and upon the premises," an averment in pleading, "that it was," it is said, will not help it: as where money was awarded to be paid by one party to the other, but it was not said, on what account, nor was it professed to be made of and upon the premises: the allegation of the party that it was so made, was held not sufficient to support the award in this part. (b) Yet it seems difficult to conceive a reason, why it should not have been presumed to have been made "of and upon the premises," rather than otherwise.—However, it is laid down in the more ancient reports, as a thing not to be disputed, that, where the award is not referred by the arbitrators to the subject in submission, or is not any generality comprehending it, the averment of the party that it is all one, cannot expound the intent of the arbitrators. (c) As if the submission be of a manor, and an award be made of an acre, and it does not appear by the award itself, that this is parcel of the manor; it cannot be made good by an averment that it is. (d)

So, where it was awarded, that the defendant should pay to the plaintiff 3l. 10s. but it was not said for what; Hobart held that this implied nothing, nor could it be helped by averment. Yet in the same place he says, that, if an action were brought for the trespass, no doubt this award might be pleaded with an averment. But why an award should be pleaded in bar of an action for the cause, on the submission of which the award was made, though that award cannot be enforced, seems to require some explanation. However, Hobart adds, "that there was no judgment given in this case; for though he himself was, and continued at the time when he reported the case, to be clearly decided, and the rest

(a) Pope v. Brett. 2 Saund. 292.

(b) Bacon v. Dubarry. 1 Lord Raym. 246. 12 Mod. 229.

(c) Dyer 242. b. pl. 39. M. 7 and 8 Eliz.

(d) Per Co. Ch. J. concessum per Doderidge, but Houghton doubted: but Coke said this is Dyer's case.

concurrent,

concurred, yet there was some varying afterwards, and so it hung, and he thinks it was compounded, for he heard no more of it." (a)

As the principal object which parties have in view, when they submit to arbitration, is to prevent any future litigation on the subject of the submission, no rule is better founded than that which requires that an award should be final. (b)

It is on this principle that it has been uniformly held, that an award that each party shall be nonsuited in the action which he has brought against the other, is not good, because a nonsuit does not bar them from bringing a new action. (c) An award ought to have four qualities, says Newton; it ought to be a final determination; the parties ought to be bound by it for ever; it ought to inflict a penalty on him who does not perform it; and it ought to be such, that performance may be compelled by the law: an award of a nonsuit, continues he, is deficient in all these respects: it is not final, and the party is not perpetually bound by it, because he may bring another action; and he cannot be compelled by the law to be nonsuited.—What is meant by the requisition "that the award should inflict a penalty on him who will not perform it," does not appear very intelligible; it cannot be supposed that it is meant, that every award should be in the alternative, "do this, or suffer a forfeiture on failure of performance," for very few awards are so penned: neither can it be supposed, that it is intended that the thing itself which is awarded, should contain any mystic virtue, which should deter the party from disobedience. The last requisite clearly refers to that distinction which was antiently taken between an award for money, and an award of any thing "collateral;" the word "collateral" being technically used to contradistinguish money from every thing else: for in those times, an award for any "collateral" thing could not be enforced, unless there was a bond for performance; if, however, there was a bond for performance, the party might

(a) Hob. 49, 50. Nichols v. Grunnion. | itur. Ff. l. 4. t. 8. f. 37.

(b) Non differendarum litium causa, sed tollendarum ad arbitrium | (c) 19 H. 6. 36. Fhbt, 51, a, b, Brooke. 45. a.

forfeit the penalty of his bond by not being nonsuited as well as by not doing any other specific thing. Another objection is indeed made to an award of a nonsuit, "that the party cannot be nonsuited without a judgment, and that, therefore, the nonsuit is in part the act of the court. But this objection would extend to the award of every act, to the accomplishment of which the concurrence of the court, or of a third person, is necessary; yet, in the very same place where this objection is taken to the award of a nonsuit, it is laid down that an award "that one of the parties shall levy a fine is good, though a fine cannot be levied without the act of the court. (a) The only well founded objection, therefore, that can apply peculiarly to the award of a nonsuit, is this, that it is not final, because it does not bar the party from bringing another action. Had the question, indeed, remained yet undecided, it might have been said, in analogy to the construction put on other cases, that he, who suffered a nonsuit, but afterwards brought another action, nominally performed the award, but in substance was guilty of a breach: however the word "nonsuit" seems to be so peculiarly appropriated to express one particular idea, that its meaning cannot be so far extended, as to imply a breach of such an award, in bringing another action: for "that an award of a nonsuit is not final," has been uniformly held from the time of the year books, to the present day. (b)

It was formerly doubted, whether an award "of a discontinuance of an action," was not equally liable to the objection of not being final, as that of a nonsuit, because the party is not bound by a discontinuance from bringing another action. (c) It was soon, however, distinguished from the case of the nonsuit, by observing that the discontinuance was altogether the act of the party, namely, the making default and not prosecuting his action; how little this distinction affects the question, may be conceived, by what has been observed a little above.—However, Rolle tells us that, "if it be awarded, that each shall discontinue the actions which he has against the other," this is good: but his opinion

(a) 5 H. 7. 22. Fhbt. 52. b.

(b) Vid. the places before cited, and Rol. Arb. T. 15. 16. 17. F. 9. 7.

6 Mod. 232. 1 Barnard. K. B. 463.

(c) Vid. the places above cited.

seems not to be founded on the principle of such an award being final; for he immediately adds: "but it is otherwise, when one is ordered to discontinue, and the other to give a release, *because then the parties have not an equal advantage.*" (a) But in another place, it is mentioned as a thing decided, "that an award to continue or discontinue a suit" is good, because it is in the power of the party to do it or not: (b) and now it seems to be taken for granted, that no objection can be taken to such an award. (c)

AN award, "that the party shall enter a *retraxit* in a suit which he has depending, is clearly final, because, after a *retraxit*, the plaintiff cannot afterwards bring another action for the same cause. (d)

AN award, "that all suits shall cease," is final: it shall be taken as if it had been said that all suits shall cease for ever; no new suit can be brought, while those ordered to cease are depending, because these may be pleaded in abatement to the others, nor can these be prosecuted because of the award; that operates as a release, and consequently extinguishes the right; for if a man release his action, and have no other remedy for his right but the action, that discharges the right; in the same manner determining the suit, determines the right of the thing, because he has no other remedy but by suit, and therefore the award is final. (e)

So, an award, "that a bill in Chancery shall be dismissed" is final: it shall be taken to mean, "that the suit shall cease for ever;" that alone being a substantial dismissal. (f)

So, "that what is awarded on one side, shall be in full of all debts and demands on the other," will aid the award, so far as what is awarded on the other is not completely final; for the word "demands" extends to every thing which the one has a right to demand or exact from the other at the time of the submission. (g)

AN award, "that the plaintiff in an action shall not prosecute

(a) Dict. 1 Rol. Rep. 362. cites 29 H. 6. 36.

(b) Per G. Croke, in the case of Gray. Godbolt. 276.

(c) Vid. 1 Barnardiston. 463.

(d) 5 H. 7. 22. Ffht. 32. b. Brooke Arb. 31. Rol. Arb. F. 7.

(e) Squire v. Greville. 6 Mod. 33. 2 Ld. Raym. 962, 964. 1 Salk. 74. vid. Tipping v. Smith. 2 Str. 1024, which seems contra.

(f) Knight v. Burton. 6 Mod. 232. 1 Salk. 75.

(g) Id.

nor proceed in the same term" is good. (a) But it is said that an award "that each party shall bear his own expences in suits depending between them," though not liable to the objection of not being mutual, is bad for want of being final, without the addition "that the suits should cease." (b) Now, however, it is apprehended, it would be presumed, that it was the intent of the arbitrators that the suits should cease. And this opinion is supported by the judgment in the following case. To an action of trespass, and false imprisonment, the defendant pleaded an award which run in these words, "Whereas there has been a suit at law between the parties, that has run to a great expence on both sides; and it being left to me to make an end of it, I determine that they shall each of them pay their own charges at law; and that the defendant pay the plaintiff five shillings, for his making the first breach in the law." The court were unanimously of opinion, that this was a fair and reasonable award, and that it must necessarily be presumed the suits were to cease, and the five shillings to be paid by the defendant, to be taken as a discharge. (c)

By the civil law, if the arbitrator declared "that the one party owed nothing to the other," though he did not prohibit the latter to sue, yet, if he did, notwithstanding, sue, he forfeited the penalty of his submission. (d) And with us, at this day, if there have been suits depending between the parties before the submission, though the arbitrator take no notice of the costs, yet if he award mutual releases, it shall be presumed that he meant each should pay his own costs. (e) And without such releases the same presumption would very probably be made if there were no other objection to the award.

With respect to a bond which the one party had against the other, it was awarded, "that the obligee should not prosecute, nor cause to be prosecuted, any suit against the obligor on the said

(a) Gray v. Gray. Cro. Jac. 525.

(b) Farmer v. Durant. 2 Keb. 351.

(c) 1 Bur. 274. Hawkins v. Colclough, vid. ante page 118.

(d) Si Arbitr pronunciaffet, "Nihil videri Titium debere Seio;" tametli

Seium non vetuisset petere, tamen, si quid petuisset, videri contra arbitri Sententiam fecisse. Ff. l. 4. t. 8. f. 28. n. 1.

(e) Dict. per Buller J. Hil. 1791.

bond;"

bond;" this was held to be sufficiently final; it was objected, indeed, that the award did not extinguish the duty, by merely ordering that he should not sue; it was however answered that this should be taken according to the *effect* of the words, which was to extinguish the duty. (a)

If the award be as final as the nature of the thing will admit, that is sufficient. Marshall, at the instigation of Knightly, brought a *qui tam* action against Philipps, on behalf of himself and the poor of a parish: Philipps, for himself, and Knightly, on behalf of Marshall, submitted, by bond, all matters in difference between the parties, to arbitration. It was awarded, that Knightly should execute a *covenant* to indemnify Philipps against all costs, damages, and expences which might happen by means of any further proceedings in the *qui tam* action: an action on the submission bond being brought, and after "no award" pleaded by the defendant, this award being set forth in the replication, one objection was taken to it, as not being final, not putting an end to the suit, but only giving a new action of covenant; it was indeed allowed, by the judge, (b) who supported this objection, that if a bond had been awarded to the plaintiff, to indemnify him in the suit depending, that would have been good; for there the arbitrators would have ascertained the penalty, as the consequence of his not performing the award: and though, by executing this bond, he had satisfied the arbitration bond, and the plaintiff's remedy was of course gone upon that, yet there subsisted as effectual a remedy on the bond awarded to be executed, as there was upon the other. But, in the present case, by the execution of the deed of covenant, the plaintiff's remedy on the arbitration bond was gone, and there was only a remedy on the covenant left in its stead, which was a satisfaction in damages to be ascertained by a jury. — But the other judges thought that the award was sufficiently final, and that at any rate, it was not competent to the defendant to make this objection; the arbitrators had in this case done every thing they possibly could do to render their award final; they could not have awarded that Marshall should discontinue the suit, which he had brought

on

(a) *Milwood v. Stokes*. Rol. Arb. O. 7.

(b) Page J.

on behalf of himself and the poor of the parish, for that would have been to divest an interest out of the poor which was vested in them by the commencement of the action: and there was no difference between the award to execute a bond or to execute a covenant, the remedy was by action in both cases. (a)

If the award be of a thing to be done at a future day, it is final, if it must then be absolutely done, as if it be to pay money at three several days to come. (b) So, to give a note or a bond, for the payment of money at a future day. (c)—But if it depend on a condition whether it must be executed or not, then it is not final; as if it be, that money shall be refunded if it appear afterwards that the party was not intitled to retain it. (d)

It was awarded, “that if one of the parties should, within four months after the date of the award, make out, that two tons of freight were discharged by him at 16l. per ton; and that if the other, within ten days, should make oath, that he received the two tons of freight at 10l. per ton, and not more, then that the first shall pay him 12l. more than was awarded to him in the former part of the award, being the difference on two tons at 16l. and 10l. per ton.” The inclination of the court seemed to be to consider this award as void, because it was not final at the time of making it. (e)

THE same opinion was held, where it was awarded that the one should pay so much money to the other, and the latter should give him a release, provided that, if the first should be discharged of any arrears due to soldiers by an act of indemnity, then the award should be void. (f) So, an award, “that, if the plaintiff, on account, prove certain articles against the defendant,

(a) Philips v. Knightly. Str. 903.
 v Barnard. 84. 151, 387, 457, 463.
 Fitzg. 54, 168, 270, but in the latter
 book, it seems the *qui tam* had been
 brought by the plaintiff in the present
 action, and that it was he who was
 awarded to covenant to indemnify,
 in return for which the defendant in

the present action was to pay him a
 sum of money.

(b) Per Dodderidge. Palm. 110.

(c) Booth v. Garnett. 2 Str. 1082.

(d) Palm. 110.

(e) Dighton v. Whiting. 6 W. 3.
 Lutw. 51.

(f) Kinge v. Fines. 3 Sid. 59.

then he shall pay so much as the plaintiff was damnified thereby," is not final. (a)

So, also, "that if the defendant make out, upon oath before a judge, any disbursements made on account of the plaintiff, that the plaintiff shall pay them; but in case the defendant do not prove these matters within a certain time limited, then the parties shall give general releases;" (b)—this is not final.

WHERE the first part of an award is final, and a proviso is afterwards added, giving a power to either of the parties to render it void, by an act to be done within a limited time *after* that appointed for the performance of that which makes it final, the proviso is repugnant to the former, and will be rejected.—Thus, if it be awarded, "that each of the parties shall, within four days after the award, release to the other, all actions, suits, and demands, before the date of the submission bond, with a proviso, that if either of the parties shall be discontented with the award, or any part of it, then, if within twenty days after the day for making the releases, the party thinking himself aggrieved shall pay 10s. to the other, the award shall be void, and either of them be at liberty against the other as before the award:" this proviso being repugnant to that which was to be *executed* before, shall be rejected, and the former part of it shall be valid; for every award ought to be reasonable and indifferent between the parties, and one part of it not repugnant to the other; but here it would be contrary to these principles to consider the award as totally void, and to set the parties at liberty, the one against the other, when they had made mutual releases; or to permit the one, when the other had released, to dissolve the award, by means of the proviso.—And it would be absurd to consider the submission-bond as forfeited, as it must be, by not making the release within the four days, and afterwards to consider it as becoming not forfeited, by the dissolution of the award, in consequence of the proviso. (c)

BUT where the proviso is not merely repugnant to the other

(a) Selby v. Russel, Comb. 456.

(b) Id. *ibid*,

(c) Dist. arg. by the court in Sherry v. Richardson, Poph. 15, 16.

part of the award, but so connected with it, that, on the construction of the whole, the award is not final, there the whole award is void.—As if in the last case the proviso had been, “that either of the parties might render the award void, by paying the 10s. within the four days limited for the making of the releases;” for here the award is not final, it being left to the parties to determine whether it shall be so or not.—So, if the proviso had been, “that within twenty days after the award made, it might be defeated on the payment of 10s.” for here the 10s. might have been paid within the four days as well as at any subsequent time within the twenty, and the party not bound to make the releases, because, before the expiration of the time within which they were to be made, that would have been done which the arbitrator intended should render the award void; and therefore the award not being final at the time when it was made cannot be supported. (a)

THE last rule to be observed in the constitution of an award is, that it shall be mutual; *The Award must be mutual.* that it shall not give an advantage to one party, without an equivalent to the other. This rule seems to have arisen from an idea of justice misapplied: understood in the general sense which the words of it convey, it supposes, that it is impossible for two parties, who submit to arbitration, not to have committed mutual injuries; and that it is equally impossible for a man to make a groundless complaint against his neighbour: some of the ancient cases shew, that the judges adopted the rule to this extent.

If two submit themselves to an award of all trespasses, and the arbitrators award, “that the one shall make amends to the other, but award nothing that he shall do to him again,” this, say the judges, is a void award; for all is for the one party, and nothing for the other.—Here they suppose it impossible for the injuries not to have been mutual.

If it be awarded, it is said, “that one shall go quit of all actions had by the other against him, and nothing be said of the actions which the other has against him,” this is void. If the

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defendant

(a) Id. ibid.

defendant plead, 'that the plaintiff and he submitted all complaints between them to arbitrators, who awarded, "that the defendant should go quit of all actions and complaints had by the plaintiff against him, without saying any thing of the actions and complaints which the defendant had against him," the plea is bad,' because, adds the court, the one should be discharged of all actions, and the other would receive nothing in satisfaction: here they would not presume that the defendant had no action or complaint against the plaintiff, nor that the complaint of the latter against the former was, in the opinion of the arbitrator, without foundation.

THEY do, however, admit, that if it be expressed by the award, that the injuries were mutual, and equal, and that therefore nothing is given on either side, this will be good.—Thus, if the award recite that the plaintiff had committed a trespass against the defendant, and that the defendant had committed a trespass against the plaintiff, and for that reason order, "that the one shall be quit against the other, and the other against him:" this they say is a good award, because it is mutual. (a)

THE principal requisite, however, to form that mutuality, about which so much is said in all the cases usually classed under this rule, is nothing more than that the thing awarded to be done, should be a final discharge of all future claim by the party in whose favour the award is made, against the other for the cause submitted; and therefore the present rule amounts to nothing more than a different form of expression of the case, which requires that an award should be final.—Thus, in the same places where it is required that an award should be mutual, it is held, that an award, "that one party shall pay to the other a certain sum of money, *in consideration of a debt long due*," is good: and the reason given is, that the party paying the money shall be discharged of the debt, which is a sufficient reciprocity to support the award. (b)

THE most frequent complaint against awards for the want of mutuality, is that when something is awarded on one side,

(a) 7 H. 6. 41. 21 H. 6. 9. 22 H. 6. 39. Br. Arbit. pl. 23 cites same case.
(b) 8 Co. 98. a. Rol. Arb. K. 5.

there is no release awarded to the other in return ; for it is uniformly held, that a release would render the award mutual : but the release must operate to the benefit of the principal in the submission, and not be confined to his attorney, who submits for him ; at least this is the conclusion to be drawn from a case, the authority of which has not yet been overruled.—An attorney, on behalf of his client, submitted by bond to perform an award : it was awarded that the attorney should pay to the other party 345*l.* and that the attorney and the other party should give mutual releases, namely, that the other party should sign a release to the use of the “attorney,” and the attorney to the other party : this was held to be an award only on one side : the attorney, it was said, submitted on behalf of his client, and nothing was awarded to his client, the release not being expressly awarded to the use of the latter, but to that of the attorney : and then the award being only that the attorney should pay the money, without saying on what account, it is not good without the releases ; but it was admitted, that if the release had been to the use of the client instead of the attorney, the award would have been mutual, and therefore good. (*a*) The place of the release, however, may frequently be supplied, by words from which it must reasonably be concluded that the arbitrator meant the party, against whom the award is made, should be discharged on performance of it. Thus, in the case preceding, it was admitted in argument, that if the money had been awarded to be paid by the attorney, “in satisfaction of all accounts,” or, “for all money due” from the client ; or if the award had purported to be made, “of and upon the premises ;” the award would, in any of these cases, been good without the releases, because then the payment of the money would of itself have been a good discharge to the client.

So, it has been admitted that an award “that all suits should cease” was equivalent to an award of a release. (*b*)

So, that all “controversies” shall cease, and that the one shall pay 10*d.* to the other, although the other have nothing given to

(*a*) Bacon v. Dubarry. Comb. 439.
1 *Ld. Raym.* 246.

(*b*) Strangford v. Green. 2 *Mod.*
228.

him, for perhaps, say the books, he had committed the greater trespass. (a)

AN award was made "of and upon the premises," that one should pay to the other 10l. at a certain day, and that the parties aforesaid shall continue in love and friendship as formerly; it was held to be an award on both sides, and that it should be intended, in satisfaction of all matters between the parties, more especially as it was said, that the parties should be friends as formerly. (b)

IF two submit all matters between them, and the award be made "of and upon the premises, in manner and form following," that is to say, that the one shall pay 40l. to the other; it is said, this is a good award on both sides, for being made concerning the premises, it cannot be intended to have been made, but in satisfaction of all matters within the submission, and cannot be taken to have been for any other cause. (c) But about the same time, it is said, that, where an award was made "of and upon the premises, in manner and form following," namely, that the one shall depart from his house, and remove his hay, and pay to the other 3l. this was an award only on one side, because it was not made of the premises *generally*, but *in manner and form following*. (d) Yet this is exactly in the same terms as the introduction of the award in the case immediately preceding.

As an award "that money shall be paid in satisfaction," is good, so other words may sometimes have the same effect; thus, it is a good award "that the one shall pay 10l. to the other for a trespass;" the word "for" implies that it is to be in satisfaction of the trespass. (e) Or "to pay so much for arrears of rent;" for that shall be taken "in satisfaction of all arrears, and

(a) Cole's case 8 Jac. Rol. Arb. K. 10. S. P. Harris v. Knipe. 13. and 14 Car. 2. 1 Lev. 58.

(b) Raymond v. Popley, and on the same award Popley v. Popley in the same term. T. 8 Car. on demurrer in debt on the bond, and a breach assigned in non-payment. Rol. Arb. K. 12. vid. etiam Id. O. 1. 2.

(c) Mawe v. Samuel. 1 Rol. Rep. 1. 2. Rol. Arb. F. 6.

(d) M. 13 Jac. Nichols v. Grunwin. Rol. Arb. K. 11. Brownl. 58. S. C. Hob. 49. in which last place it is said that no judgment was given.

(e) Ormlade v. Coke. Cro. Jac. 354. S. P. Hob. 49. Freem. 205. 266.

the party discharged by payment. (a) So, "for having made the first breach in the law," implies that the sum awarded shall be taken in satisfaction. (b) Yet, where the submission was of all suits depending between the plaintiff and defendant in the Spiritual Court "for tythes;" and it was awarded, that the defendant should pay 40s. to the plaintiff "for the tythes," on such a day; it was held, that this award was not mutual, because nothing was awarded for the advantage of the defendant, as that he should be free suits, or something equivalent: it may be observed, however, that the award, being of 40s. "for the tythes," it must necessarily be implied, that the 40s. were intended to be in satisfaction. (c)

AN award recited that there had been considerable dealings between the plaintiff and the defendant, that the plaintiff had paid to the defendant all his demands, and that 40l. were due to the plaintiff, and then ordered that the defendant should pay to the plaintiff the 40l. It was held, that the recital of the dealings between the parties, and of the payment by the plaintiff of all that was due on his part, implied that the payment of the 40l. by the defendant was intended to be in full satisfaction of the debt. (d)

IT was awarded that the defendant should pay to the plaintiffs 15l. on or before a certain day, which the arbitrators adjudged to them for the costs and damages they had sustained by reason of a suit commenced against them without cause by the defendant, and that all suits and differences should cease which were between the parties before the date of the submission bond: it was objected that the award was not mutual, because it was no benefit to the defendant to stay his own suit and pay 15l. costs; but the objection was considered to be without foundation; as indeed nothing but the grossest misconception of the real meaning of the rule, which requires awards to be mutual, could have given rise to such an objection. (e)

IN the more ancient reports, however, the rule seems to have

(a) Hopper v. Hackett. 1 Lev. 132.
 (b) 1 Bur. 277.
 (c) Colston v. Harris.

(d) Elliott v. Cheval. Lutw. 541.
 (e) Watmough v. Holgate. 2 Vent. 221. 222. S. P. Comb. 212.

been so understood, that either the thing which was awarded must of itself imply a discharge to the party against whom the award was made, or some positive terms must have been added which shewed the arbitrator's intention that a discharge should be the consequence ; (a) for otherwise, it was thought, it could not be known for what cause the thing awarded was to be done, and therefore nothing could be presumed to be discharged by it.

If it had been awarded that the obligor, in a single (b) bond, should pay the debt, if it was not added that he should thereupon be discharged, the award was held not binding for want of mutuality, because the payment of the money due by a single bond could not be pleaded to an action on the bond, without a release. (c) But this reason, since the statute for the amendment of the law, (d) has no longer any weight.

If it appeared, however, by the general tenor of the award, that the thing awarded to be done on one side, was intended as a recompence for injuries sustained by the other, that was considered as rendering the award sufficiently mutual, without any words of discharge.

AN award 'reciting the submission to have been of all differences between the parties ; reciting also, that these differences being understood by the arbitrators, who were satisfied that certain allegations, made in a bill exhibited by the plaintiff in the Star-chamber against the defendant, were for the most part known to the latter to be true, namely, "That the defendant had taken of the plaintiff 40s. for a superedeas to reverse an outlawry against the plaintiff, but had not reversed it ; that he had taken of the plaintiff 20s. more as a fee pretended to be due to him on an execution for 26l. sued against the plaintiff ; neither the defendant, who was then under-sheriff of Dorset, nor any one for him, having ever enforced the execution ; that the plaintiff had been imprisoned, by means of the defendant, by one J. S. who had arrested him without any warrant directed to him,

(a) May v. Samuel. Rol. Arb.
F. 3. Kirby v. Pigot. 25 Car. 2.
3 Keb. 140.

(b) It may not be altogether use-

less to observe here, that a *single* bond means a bond without a penalty.

(c) Hob. 49 Brownl. 58.

(d) 4 Ann. c. 16. s. 12.

and that the plaintiff had been compelled by J. S. to pay 20s. for this unjust arrest, before he was permitted to go at large :” reciting further, that the plaintiff was an honest man and of good reputation, and a tradesman, having a wife and six children, and that by reason of the circumstances before recited he had sustained great damage, scandal and discredit :’ ordered the defendant to pay to the plaintiff 500l. by different payments, on certain specific days.—It was objected to this award, that it was not mutual, because the 500l. were not awarded to be paid in satisfaction for the wrongs recited, nor in consideration of them, nor for them, nor were there any words which implied a discharge to the defendant : but the court held the award good, and that the payment of the 500l. must necessarily be intended to be as a satisfaction for the wrongs. (a)

AND it may, now, be safely laid down, that it is not necessary that the award itself should express that a sum awarded to be paid, or an act to be done in favour of one of the parties shall be in satisfaction ; or that it should contain any equivalent terms : a discharge to the other must necessarily be presumed from the payment of the sum or the performance of the act.—Thus, the defendant having pleaded to an action of trespass, that the plaintiff and he had submitted the trespass aforesaid to arbitrators, who had awarded that the defendant should pay to the plaintiff 7l. on a certain day, and also two thirds of such costs as he had been put to in and about the suit, the submission having been after an imparlance : this was held to be good, though no releases were awarded, nor any words of satisfaction were used. (b) It seems indeed a little extraordinary that the plaintiff, in whose favour the award was made, should have objected to it, for so singular a reason as that the money to be paid to him by the defendant was not awarded to be in satisfaction or discharge of any thing, and that nothing was awarded to be done to the de-

(a) 16 Car. B. R. *Burbidge v. Raymond* in a writ of error on a judgment in C. B. where it had been adjudged a void award on demurrer. But B. R. affirmed the judgment for

a clear defect in the manner of pleading, though they thought the award good.—*Rol. Arb. K. 17.*

(b) *Tomlinson v. Ariskin. Comyns* 328.

fendant or for his benefit: the objection can be reconciled to common sense on no other principle, than a supposition that had the plaintiff sued on the award, the defendant might have objected to it for the reasons now assigned by the plaintiff.

To an action on a bond conditioned for the performance of an award, the defendant pleaded that no award was made: the plaintiff in his replication set forth an award, "that the defendant should pay to the plaintiff 12l. on a particular day, and take away his mare and colt from the plaintiff's within a week:" this was held to be a mutual award, because it should be presumed, that the possession which by the award the plaintiff appeared to have of the mare and colt was legal, as by distress for damage feasant, by bailment, or other means by which the plaintiff might have justified the detention. (a)

THESE two cases seem fully to justify the observation which immediately precedes them. The first is indeed the case of a parol award, and it does not appear whether the second was by parol or in writing: the condition of the bond enabled the arbitrator to make his award in either way, and the replication only states that he made and published his award within the time limited, but does not alledge in what manner: there seems, however, to be no good reason for making any distinction, in this respect, between an award by parol, and one in writing.

ALL the preceding rules apply only to particular parts of an award; but there are many cases in which, though the award, in particular parts, be void, because these are not conformable to some one or other of these rules, yet it is good for the remainder. And there are also a great many cases in which the circumstance of its being void for part, renders it void for the whole: but in order to consider this part of the subject with advantage, it seems proper to collect what is to be found in the books with respect to the construction of awards.

IN former times, the courts considered
How Awards shall be construed. awards, with respect to their construction, in a very different manner from that in which they considered deeds and wills: the latter, they

(a) Cooper v. Hirft. Lutw. 539.

they held, ought to be construed according to the intent of the parties, and the meaning of the words to be collected from the whole of the instrument put together; but an award they considered to be in the nature of a judgment, which ought to be plain and correct, and that therefore there ought to be no necessity to collect the meaning of the arbitrators; for that such a collection would not be their judgment, but the conjecture of another of what they had intended to decide. (a)

THE adherence of the courts to this rule was in many instances so rigorous and strict, that the power of referring disputes to arbitration, instead of being a benefit to the parties, often well merited that reflection which a learned judge once made with respect to references at *nisi prius*, that he never knew any good to arise from them.

IN those times, even a mistake in the recital of a day mentioned in the former part of an award, was thought sufficient to render the award void, though it would otherwise have been good. Thus where, on a submission of the title of copyhold land, the arbitrator, after awarding the payment of a small sum of money by one of the parties, on the "twenty" first day of May, ordered the other to release to him on the aforesaid first day, omitting the word "twenty," all his right to the copyhold land, and that three years after he should make further assurance: the award was held to be void, on account of the omission of the word "twenty," because there being no such day before mentioned as the first of May, there was no day from which the three years could be calculated, and consequently no further assurance could be made. (b) The court thought they were not at liberty either to supply the word "twenty," which would have given effect to the intention of the arbitrator, or to reject the word "aforesaid," which, though a little deviating from his meaning, would have made the award completely certain.

TOWARDS the end of the reign of James the first, however, the judges laid down more liberal rules to be observed in the construction of awards; holding, that they should be interpreted,

(a) Brownl. 92. Yelv. 98.

(b) Markham v. Jennings. Rol.

Arb. K. 15. Q. 6. Cro. Jac. 149.
Yelv. 97. 98.

as deeds, according to the intention of the arbitrators ; that they should be considered, with the same favour as the " arbitrium boni viri," in the civil law ; that therefore they should not be taken strictly, but liberally, according to the intent of the parties submitting, and according to the power given to the arbitrators : that " all actions" mentioned in the award should be taken to mean " all actions over which the arbitrators have power by the submission ;" and that if there were any contradiction in the words of an award, so that the one part could not stand consistently with the other, the first part should stand, and the latter be rejected : but that if the latter were only an explanation of the former, both parts should stand. (a)

So, it was held, that if an award were made generally in satisfaction of all controversies without any limitation, this should be construed to extend only to such controversies as are within the submission. (b)

IF, by manifest implication, that appear, which, if positively expressed, would render the award good, that is sufficient to support it.

THE submission was of all controversies between the parties, and it was awarded, " that the one should pay to the other 10l. on a particular day, and that the other, on the receipt of the 10l. should give to the first a general release." It was objected, that if he to whom the 10l. were to be paid refused to receive it, he was not bound to give the release, and the award, for that reason, was only on one side, and therefore void ; but the objection was overruled, and the award held to be good ; because, when it is awarded that the one shall pay 10l. to the other, it is, by necessary implication, awarded that the other shall receive it : in the same manner as if it had been awarded that the payment should be in satisfaction of all controversies between them, in which case it must have been implied that the other should receive it in satisfaction : in the present times it will appear strange that there should have been any necessity for the judgment of a

(a) Dict. per Doderidge. Palm. 108. 3 Bulstr. 66, 67.

(b) Brown's case, cited Hutton, 9.

court in this case, but in the reign of Charles the first, the matter was so far from being clear, that the unsuccessful party not being satisfied with the judgment of the court below, appealed to parliament in a writ of error, where the judgment was confirmed by the opinion of all the judges. (a)

AN award "that the one shall keep and enjoy the goods in dispute, "paying" so much money to the other," must be construed in the same manner as if it had been expressed imperatively, "that he should pay." (b)

IT was awarded "that the defendant should pay 10l. to the plaintiff, and fetch away his mare and colt;" it was objected, that it was not awarded that the plaintiff should deliver the mare and colt: it was adjudged, that that must necessarily be implied. (c)

So, it might reasonably be supposed, that, where the award was, "that the plaintiff, for work done, should "accept" a bill of sale from the defendant, of the eighth part of a ship," there could have been no harm in implying that the defendant should "give" the bill of sale: in common language, a man cannot *accept* a thing, which it is not in his option to have, and it could not be in his option to have it, unless the other was bound to *give* it. (d)

ON the same principle, it would seem that an award, "that the plaintiffs should pay 30l. to the defendant, and that they should receive their goods left by the defendant in the hands of a third person for their use," were good, and that the defendant should be bound to procure the delivery of the goods. (e)

IT was awarded "that the defendant should enjoy a house of which the plaintiff was lessee for years, during the term, paying to the plaintiff 20s. yearly:" this was construed not to be merely a condition annexed to the award of the defendant's enjoyment of the house, but it was considered to be a part of the award it-

(a) M. 22 Car. B. R. Linnen v. Williamson. Rol. Arb. K. 16. cited 6 Mod. 35. & Ld. Raym. 965.

(b) Stiles v. Triste. 1 Sid. 54.

(c) Hooper v. Hirft. Lutw. 539, cited 1 Ld. Raym. 612.

(d) Dis aliter visum. Clapcott v. Davy. 1 Ld. Raym. 612.

(e) But semb. contr. Dighton v. Whiting, Lutw. 51.

self, that being evidently the intention of the arbitrators: and it was held, that an action of debt on the bond, would lie for the non-payment of the 20s. (a)

THE submission was of certain controversies respecting a wine licence, and the arrears of rent issuing out of certain land; the award was in such terms as these, "that whereas it appeared to the arbitrators that 15l. remained due to the plaintiff, they ordered that the defendant should pay him 7l. 10s. in satisfaction of so much of the 15l. and should assign to him the wine licence:" it was held, in the first place, that though it was not expressed on what account the defendant was indebted to the plaintiff, it should be presumed to be for no other cause than for the rent; and secondly, though it was not said that the wine licence should be assigned in satisfaction of the residue of the 15l. the better opinion was that it should be so presumed. (b)

WHERE the words of an award have any ambiguity in them, they are always to be construed in such a manner as to give effect to the award.—Thus, if money be awarded to be paid "in full of all demands;" these words shall be construed to mean "in full of all demands up to the time of the submission only, not to the time of the award, or to the time of payment. (c)

ON a submission by the parson and part of his parishioners on behalf of themselves and the rest, with respect to tythes, it was awarded, that each of the parishioners should give the parson notice, when he intended to shear his sheep; in answer to an objection that the award was unreasonable, because the parishioner must follow the parson wherever he might be, in order to give him notice, it was held, that the award must be construed to mean that the notice should be given at the parsonage-house. (d)

IT was awarded that the defendant should pay to the plaintiff so much money, on the first of April, and so much on the first of May; and that the parties should pay 1l. 5s. each to the arbitrators for their trouble; and that "on payment of the mo-

(a) *Parsons v. Parsons*. Cro. El. 211. S. P. M. 18 and 19 El. inter *Tressam et Robins*.

(b) Al. 51.

(c) Per Powell J. 6 Mod. 35.

(d) Litt. 30.

ney aforefaid" on the firft of May, they fhould give mutual releafes : here the words "on payment of the money aforefaid," coming after the award of the money to the arbitrators, it was contended they fhould be referred to the whole, as well to the money to be paid to the arbitrators, as to that to be paid to the plaintiff by the defendant ; and, according to the opinion which then prevailed, the award being void as to the former, becaufe performance of it could not be compelled, and the releafes not being awarded to be given till performance, it was infifted the award was void for want of mutuality : but the court held that thefe words, "the money aforefaid," fhould be referred only to thofe fums with refpect to which the award was good, and not to the money awarded to be paid to the arbitrators. (a)

AN award, reciting that fo much money had been difburfed by one party, as was *alleged*, ordered that money to be paid by the other : in favour of the award, the court held, that this fhould be underftood as *alleged*, and not controverted or difproved : and that it fhould not be fupposed that the arbitrators did not inquire into the matter, or that they awarded payment from the mere allegation of the difburfement. (b)

IT was awarded that the defendant fhould pay to the plaintiff 8l. on the 14th of April, "and that he fhould deliver to the plaintiff a certain writing obligatory, or a certain bill obligatory, which he had before," and that *then* the one fhould make to the other general releafes. In favour of the award, the court held, that the word *then* fhould be referred to the 14th of April, and not to the delivery of the bond to the plaintiff, that the objection to the uncertainty of the intervening phrafe might not excufe the payment of the money. (c)

A MISRECITAL of the fubmiffion fhall not avoid the award : thus, where it appeared by fpecial verdict that the fubmiffion bond of the plaintiff was dated on the 22d of February, and that of the defendant on the 9th of March ; but the award recited the latter to have been on the fame day with the former ; this was

(a) *Abraham v. Brandon.* 10 Mod. 201.

(b) *Knight v. Burton.* 6 Mod. 252.

(c) *Bedam v. Clerkfon.* 1 Ld. Raym. 123.

held not to be material. (*a*) So, where the submission was dated on the 10th of February, and the award recited as of the 7th. (*b*)

NOR is it any objection that money is awarded to be paid at a place by name with the addition of the word "aforesaid;" though the place has not been mentioned before; the word "aforesaid," in such a case, is to be rejected as surplusage. (*c*)

IF the submission be "so that the award be made on or before a particular day, or that the arbitrators shall choose an umpire," and the umpire so chosen make an award, reciting that the parties had bound themselves to stand to his award; though compared to the words of the submission, this be not literally true, yet an objection on that account will not be allowed, because it is but recital. (*d*)

WHERE the submission contains the clause of "ita quod," and the award is made with reference to that clause, this shall controul the construction of the award in such a manner as to support it, though the words in their natural signification be more comprehensive than the submission, and it shall be intended that nothing was in controversy but what was comprehended in the submission, unless the contrary be shewn: and on the contrary, if the words of the award be not so comprehensive as those of the submission, yet, unless the contrary be also shewn, it shall not be intended that any thing more was in controversy than what is comprehended in the award. (*e*)

THE submission was by bond conditioned to stand to the award of J. S. so that it were made "of and upon the premises;" the award referring to that clause, ordered that one of the parties should pay to the other 10l. two months after the award, and that on such payment each should make to the other a general release up to the time of the payment, though the release comprehended a time beyond the submission, and though it was objected that the bond or promise of submission would be released: this was held to be a good award, for by the payment

(*a*) Al. 85. 87.

(*b*) Toll v. Dawson. 1 Vent. 184.

(*c*) Lambard v. Kingsford. Lutw. 558.

(*d*) Adams v. Adams. 2 Mod,

169.

(*e*) 6 Mod. 232.

of the money the submission was at an end, and every thing depending on it; and, on account of the clause of "*ita quod*," the release should be taken to extend only to the things submitted. (*a*)

ON a similar submission, it was awarded that the one party should pay to the other 10*l.* in satisfaction of all actions, suits, and accounts which he might have against him for any matter to the time of the award made, and that all suits then depending, or which afterwards should be depending between them, for any matter, from the beginning of the world to the time of the award made, should cease; this was held good, though it comprehended a time beyond the submission, because it must be presumed, without being shewn, that nothing had arisen between the time of the submission and the award. (*b*)

THE submission was of all actions personal, "so that the award were made of and upon the premises," before Easter: the award made before Easter, and professing to be made, "of and upon the premises," ordered that the one should pay to the other 20*l.* at Midsummer next ensuing, and that *then* the other should release to him all actions personal, in satisfaction of all matters personal between them; this being made "of and upon the premises," it was held, that it must be intended that the release was to be of actions only till the time of the submission, and not till Midsummer. (*c*)

So, where an award was made "of and upon the premises," that all actions and controversies between the parties should cease; it was held that, though the latter words, in strict grammatical propriety, applied to all matters and controversies at the time when they were used, that is, at the time of the award, yet the words, "of and upon the premises," should controul the

(*a*) *Dubitatur* M. 14 Car. B. R. *Atroke v. Orwell*, moved in arrest of judgment and the *Posse* stay sur ceo. Rol. Arb. O. 4. Vid. acc. 2 Mod. 170.

(*b*) 23 Car. B. R. *Lerwyn v.*

Hills on demurrer. Rol. Arb. O. 5. S. C. Al. 26. there called *Gurman v. Hill*.

(*c*) 5 Jac. *Gosse v. Brown*. Rol. Arb. M. 1. Hob. 258. S. C. cited Mo. 885. pl. 1242.

meaning, and refer it only to controversies at the time of the submission. (a)

THERE is no doubt but that at present, without the help of this controuling clause, the same construction would prevail in all cases similar to the preceding; even in those times of nicety, it was held that an award of a sum of money *now* in controversy, was good, for that it should be understood to have been in controversy at the time of the submission as well as at the time of the award. (b)

MUCH difficulty, it has been observed, occurs in all the more ancient reports, on the construction that ought to be put on the award of a release: that which was naturally adopted as the most probable mode of putting an end to litigation, between the contending parties, has, in almost numberless instances, been the great obstacle to the accomplishment of that purpose.—It has not been without an obstinate struggle, that an award of a “general” release, unaccompanied with any words from which an unfavourable construction might, with any shew of reason, be put upon it, has been admitted to be good; though so early as the reign of Charles the second a distinction was made between the award of a “general release,” without additional words, and of a “general release to the time of the award;” (c) yet, so late as the seventeenth of George the third, an objection was seriously taken to an award because it ordered a “general release.” On a reference at *nisi prius* of all matters in question *in the cause*, the arbitrators had at first ordered the parties to give general mutual releases; but afterwards observing that the reference was not of *all matters between the parties*, they thought they had exceeded their authority, and therefore they made another award, in every other respect the same as the former, but instead of *general* releases, ordered *special* releases of all matters in difference in that cause. An application was made to the court to have both awards set aside, the first because of the general releases, and the second, because it was made after the ar-

(a) Cro. El. 861. Goodman v. Fountain.

(b) Baspole v. Freeman. Cro. Jac. 285.

(c) Vasque v. Daniel. 25 Car. 2. 3 Keb. 253.

bitrators had executed their authority. The court however held that the first award might be supported, either by construing the release to be so far good as it fell within the authority of the arbitrators, or if it must be supposed to be one intire thing, by rejecting it altogether. (a)

THE leading case on this subject is that of Vanlore and Tribb, as given in Rolle's Abridgment: (b) the submission was made on the first of May, of all controversies between the parties: the award was made on the fourth of May, and ordered that one should give a general release to the time of the award: this was held to be altogether void, because, comprehending a time out of the submission, and extending to controversies that might have arisen between the first and the fourth of May, it was void as to these, and being an intire thing it must be considered as void in the whole.

BUT the principal reason given by the court for this determination was, that by this release, the bond or assumpsit, by which the opposite party was bound to perform the award, would be released. And this reason has been adopted in subsequent cases.

IT was awarded that the defendant should pay to the plaintiff two sums at two several days, and that several releases should be given *presently*: the court held this was void, because the release would discharge both the arbitration bond and the money awarded to the plaintiff. (c) Here the court must have proceeded on the idea that the release was an intire act, and that a release to the time of the submission would not have been performance.

THE submission bond was dated the 2d of July: the award was that the defendant should execute a general release to the plaintiff to the 12th of August following, and that then the plaintiff should give a general release to the defendant: to this it was objected, that as the defendant was to give the first release, if the plaintiff afterwards refused to give his in return, the defendant

(a) Pickering v. Watson. 2 Bl. Rep. 1117. M. 17. G. 3. C. B.

(b) Rol. Arb. N. 1. vid. Maws v. Samuel. 2 Rol. Rep. 2, the same

doctrine. Kynaston v. Jones. Rol. Arb. N. 2.

(c) Adams v. Adams. 2 Mod. 169.

would have no remedy; for, if, on such refusal, the defendant should sue on the submission bond, and assign the breach in this that the plaintiff had not executed the release on his part, he might plead the present defendant's release in bar of this action on the bond.—And here a distinction was made by Powell, J. between an award of releases generally, and an award of releases to be executed to the time of the award made: (*a*) in the former case, he said, the release should be understood to relate only to the time of the submission; but in the latter, such a construction could not be admitted, because, going expressly beyond the time of the submission, it would release the bond of submission itself, and all intermediate acts. But Treby, C. J. said that it had been held in such a case, that the submission bond should be excepted. (*b*) And it certainly had been so held, about seven years before, in the following case. To debt on a bond conditioned to perform an award, the defendant pleaded “no award.” The plaintiff, in his replication, set forth an award, “that the defendant should pay 5*l.* to the plaintiff presently, and give bond for the payment of 10*l.* more on the 29th of November following, and that the parties should “now” sign general releases; on demurrer, this was argued to be a void award, because mutual releases were to be given at the time of the award, which would discharge the bond payable in November following. But the court overruled the demurrer, saying the releases should discharge such matters only as were depending at the time of the submission. (*c*)

CHIEF Justice Trevor, however, afterwards (*d*) supported the distinction taken by Powell, saying that “to hold that a tender of a release to the time of the submission was a sufficient performance, where the arbitrators had awarded a release to the time of the award,” would be to *make* an award, and not to declare the law upon it, and then farewell all awards.

It is now, however, clearly settled, that an award of releases

(*a*) See this distinction 3 Lev. 188, 344. 1 Show. 272.

(*b*) Marks v. Marriot. 1 Ld. Raym. 115, 116. M. 8. W. 3.

(*c*) Rees v. Phelps. M. 1. W. and M. 3 Mod. 264.

(*d*) M. 13 W. 3. Lee v. Elkins. Mod. 590. Lutw. 545.

up to the time of making the award, is not altogether void, but that it shall be construed so as to *support* the award, and that for two reasons: the first, that it shall be intended that no difference has arisen since the time of the submission, unless it be shewn specially that there has; the second, that a release to the time of the submission is a good performance of an award ordering a release to the *time* of the award; not because the meaning of the arbitrators is so, but because their meaning must be controuled so far as it is void, by construction of law. (a)

I SHALL conclude this part of the subject with one general observation; that though an award must possess all the qualities which have been described as necessarily belonging to it, yet the courts, in modern times, have repeatedly declared that they disapproved of the strictness with which they were formerly construed, and that they will always adopt a liberal construction, in order that awards may answer the purpose for which they are intended. (b) Lord Hardwicke too, on one occasion, declared, that as courts of law had relaxed considerably from the rigour formerly observed, it might possibly be of consequence to consider, whether courts of equity might not still take greater latitude; but he said he was unwilling to do this, because it would introduce confusion and uncertainty, rendering awards a mixed case, partly determined by arbitrators, and partly by the authority of courts of equity, and therefore he chose rather to confine himself to one rule. (c)

IN early times, if one part of an award was void, the whole was considered as void: *When an Award,* but in the reign of Queen Elizabeth, Holt *though void for part,* says (d) in the reign of King James the *shall be good for the* first, it began to be the rule of the courts, *rest.* in many cases, to enforce the performance of that which, had it stood by itself, would have been good, notwithstanding another part might be bad: but the adoption of this

(a) *Ahrahah v. Brandon.* 10 Mod. 301. *Squire v. Grevill.* 6 Mod. 33. 35. 2 Ld. Raym. 964, 5. *Cooper v. Pierce.* 1 Ld. Raym. 116. vid. 11

Mod. 116. *Godb.* 164, 5. 2 Keb. 431.

(b) Per Ld. Mansfield. 1 Bur. 277.

(c) A Atk. 504. (519)

(d) 12 Mod. 534.

rule without restriction; it was soon discovered would, in many instances, be productive of injustice. It became therefore necessary to distinguish in what cases the rule should be adopted, and in what it should be rejected. The principles by which the application of the rule shall be directed are not very accurately explained in the books; but, from a general purview of the cases, I will venture to express them in general terms, and give under each the cases which seem to justify my assertions.

If an award be void as to part only of what is ordered to be done by one of the parties, but good as to the rest, it is not competent to him who is ordered to perform it to object to the whole, on account of the part which is void; but he must perform the part for which the award is good, as if it stood by itself; unless the opposite party could object to the performance of *his* part, on account of the want of remedy to enforce performance of the part which is void on the other. (*a*)

Thus, if the submission be of a particular thing, and the award made of that which is submitted, and also of something else to be done by the same party, though with respect to the latter the award be good, yet he shall be bound to perform the rest. (*b*)

As, if the submission be of all matters depending, and the award be that one of the parties shall not prosecute any action depending or arisen at the time of the award made, where there are actions depending between the time of the submission and the award, in which case the award is void as to them, yet the award being good for those which were depending at the time of the submission, must be so far performed. (*c*)

If it be awarded that one shall pay so much to the other, and that he shall give bond with two sureties for that sum, though this be void as to the sureties, yet he must give a bond himself. (*d*)

So, "that the defendant shall pay the plaintiff 15*l*. and find three sureties for the payment of a *further* sum," though void with respect to the sureties he must pay the 15*l*. and be bound

(*a*) Vid. Rol. Arb. N. 6.

(*b*) Tompkins v. Webb. 2 Rol. Rep. 46.

(*c*) 18 Jac. Sayer v. Sayer. Rol. Arb. N. 5.

(*d*) Vid. 19 E. 4. 1. 18 Ed. 4. 23. cited Cro. El. 432. Rol. Arb. N. 7. 1 Rol. Rep. 270. 2 Lev. 6. 3 Leon. 62.

himself for the further sum, if no objection can be taken to any other part of the award. (e).

So, if it be awarded that the one shall make assurance of certain land, within the submission, to the other and his *wife*, though this be void as to the wife, who is a stranger to the submission, yet it is good for the rest, and he must convey the land to the other party himself. (a)

So, if the award be that one of the parties *and* his wife levy a fine, of the land in dispute, to the other, though this be void as to the wife, yet the husband must levy a fine, otherwise he will forfeit his bond. (b) So, if the award be that he shall make an estate of certain lands to the plaintiff for life, with remainder to a stranger in fee, this is good for the estate to the plaintiff for life, and for so much must be performed, though it be void for the rest. (c)

So, when it was held that the arbitrator had no power over the costs of the arbitration, yet "an award that one of the parties should pay a sum of money to the other, and so much for writing the award," must have been performed with respect to the money to be paid to the other party." (d)

THE submission was by bond, conditioned to stand to an award of all controversies and doubts, had, made, moved or stirred between the parties from the beginning of the world 'till the day of the date of the bond: it was awarded that the one should pay to the other 10*l.* which appeared by his confession to have been received by him; and if it should appear in a month, and due proof should be made that he had received more than he had confessed, then he should pay that also. It was objected that all doubts were referred, and the condition contained a proviso that the award should be made of the premises, yet the arbitrators had not made an end of all doubts, as it appeared they doubted whether more was due or not: but the court held, that as it was not

(e) *Id.*

(a) *M.* 37. 38 *El.* *Samon v. Pitt.*

Roll. Arb. N. 8.

(b) *Keilw.* 43. a. b. 45 b. 2 *Keb.* 290.

(c) *Bretton v. Pratt.* *Cro. El.* 758.

pl. 27.

(d) *Perryn v. Barry.* *Bridgeman* 90, 91. *Pinkney v. Bullock.* 2 *Keb.* 759. 2 *Lev.* 3.

averred that there was any doubt moved or stirred between the parties at the time of the submission, it should be presumed that this doubt arose in the minds of the arbitrators *after* the submission, and that they added this reservation only by way of greater caution on their own part: and though such a reservation was void, yet the award was good for the payment of the 10l. (a)

If that part of the award which is void, be so connected with the rest as to affect the justice of the case between the parties, the award is void for the whole.—Thus, where it was awarded “that the defendant should pay to the plaintiff 40l. by instalments, namely, 10l. at Michaelmas, 20l. at Christmas, and 10l. at the annunciation; and, if before the last payment it should seem to the arbitrator that the defendant was engaged for the plaintiff in any debt not satisfied, he should repay him so much, as the debt not satisfied amounted to; and that the parties should give mutual releases;” it was held, that that part with respect to the reimbursement being void, and affecting the whole of the award, the whole was void. (b)

I HAVE ventured to assert that it is not necessary that an award should be mutual, in the sense in which the rule is expressed, and in which it is commonly understood, namely, that something must be awarded in favour of each party: however, when from the tenor of the award, it appears that the arbitrator has intended that his award should be mutual, awarding something in favour of one of the parties as an equivalent for what he has awarded in favour of the other; if then by any of the rules for the constitution of an award, that which is awarded on one side, be void, so that performance of it cannot be enforced, the award is void for the whole, because that mutuality, which the arbitrator intended, cannot be preserved.

THUS, where the dispute related to the title of a copyhold tenement, and it was awarded that the defendant should pay 6l. to the plaintiff on the twenty-first of May, and that then the plaintiff should release all his right to the copyhold, and three months

(a) *Jeanes v. Fourthe* on a writ of error from C. B. and judgment affirmed in B. R. H. 10 Car. Rol. Arb. M. 6.

(b) *Winch and Grave v. Saunders*, Cro. Jac. 584.

after the aforesaid first of May should make further assurance to the defendant; at a time when the courts would not supply the word "twenty," but for want of it held all that part of the award to be void; it was perfectly consonant to reason and justice that they should hold the award void for the whole, and not force the defendant to pay the 6*l*. when he could not have that in return which was intended by the arbitrator as a consideration for it. (*a*)

So, when it was held that the arbitrator had no power over the costs of the reference, if it had been awarded that one of the parties should pay the other 10*l*. and that the latter should pay the costs of the reference: the latter part being void, and intended as a recompence or equivalent for the other, it was reasonable to consider the whole award as void. (*b*)

So, where A. and B. submitted, to certain arbitrators, the title of certain land, who awarded that all controversies should cease concerning the land, and that B. should pay to A. 8*l*. and that A. his wife and son and heir apparent, by the procurement of A. should pass to B. such assurance of the land as B. should require; this was held to be void for the whole; A. could not compel his wife and son, who were strangers to the submission, to make the assurance, and perhaps the wife and son had the estate of the land in them, and their passing the estate was the consideration for which the 8*l*. were awarded to be paid by B. to A. (*c*)

It was awarded that the defendant should pay and satisfy the plaintiff for task work, and days work done by the latter for the former, and that then the plaintiff should pay to the defendant 25*l*. and give him a general release of all controversies: this was held to be void for the whole, because being void for that awarded to be done by the defendant on account of the uncertainty of how much he was to pay to the plaintiff for the task work and days work, the recompence intended for the plaintiff was gone. (*d*)

If one intire act awarded to be done on one side comprehend several things for some of which it would be good, and for others

(*a*) Yel. 98. Markham v. Jennings. Rol. Arb. K. 15. Brownl. 92.

(*b*) Rol. Arb. K. 13. 14. Cro. Jac. 577. 8. Al. 10. 10 Mod. 201.

(*c*) Barney v. Faierschilde. Rol. Arb. N. 9.

(*d*) 2 Saund. 293.

not, the award is bad for the whole, because the act cannot be divided.—As if an aggregate sum be awarded to be paid to one of the parties for considerations expressed in the award, some of which are within the submission, and others out of it, this is void for the whole, because it is impossible to distinguish how much was intended for the considerations.—Thus, where the submission was of all controversies between the plaintiff and defendant, and the wife of the latter, for divers sums of money laid out for the wife by the plaintiff at her *request* when she was sole: an award “that the defendant should pay to the plaintiff a certain sum of money, for all sums laid out by him for the wife while sole, without the addition of its being at her *request*,” was held void, in those times when the courts were unwilling to presume any thing in favour of an award, and therefore would not take it for granted that the whole was laid out at the request of the wife: and in this case had any thing been awarded on the other side, the award would have been totally void, because it would have wanted that mutuality which the arbitrators had intended to prevail in their award. (a)

WHEN it was held that a release extending to a time beyond the submission, was void for the whole, and that the execution of a release to the time of the submission was not a good performance of an award which ordered a release to the time of the award; and when it was held that, without a release, no satisfaction could be presumed, unless some words were used which necessarily implied a satisfaction: in those times, if money had been ordered to be paid, and then a release from the other to a time beyond the submission, the latter part being void, the whole award would have been void. (b)—This is the doctrine of Rolle in his abridgment of the case of Vanlore and Tribb, from his own reports; and from this case as given in the abridgment, all the difficulties with respect to releases have arisen.

THE case as given in his reports, by no means justifies his conclusion here: in these the award is stated to have been, “that one

(a) Waters v. Bridges, adjudged
on a writ of error. Cro. Jac. 639.

(b) Vanlore v. Tribb. Rol. Arb.
N. 1. cites his own Reports.

of the parties should pay so much to the other in satisfaction of all duties which "he" (the latter as it would seem) had against "him" (the former apparently) as administrator to J. S. and that "he" (it appears doubtful which of the two is here meant) should make a release to "him" (here the same doubt prevails) of all actions to the day of the award:" the breach assigned was the non-payment of the money, and the question was, whether, as the award was confessedly void as to the release, "he" should be bound to perform the remainder, that is to pay the money.—The doubt with respect to the award as here stated is whether from the confusion of the pronouns we are to understand that the release was to be given by the same person who was to pay the money, or by the other to him in consequence of the payment; if we are to understand the former to have been the case, as seems necessarily to be implied from the manner of reasoning both of the court and counsel, there could be no question but he was bound to pay the money, for that was altogether independent of the release.—It is laid down as a principle in the argument of the counsel, that as the party is bound to perform every thing in the award, therefore he ought to perform that which is good, though part be void; this is adopted by the court, and judgment given accordingly for the plaintiff. (a) Had the release been awarded to be given by the other party on payment of the money to him, then the question could not have been directly whether he who was to pay the money was bound to perform his part of the award; but that would have depended ultimately on the question with respect to the release itself; and according to the principles which then prevailed the award with respect to the release would have been considered as void, and therefore that being the recompence for the payment of the money the award would have been of one side only, and therefore void for the whole, according to the doctrine of the abridgment.

THE next case in the abridgment, is one of a submission on the first of May of all matters between the parties, and an award that the one should pay to the other 20s. in satisfaction of all matters between them to the time of making the award, which

was

(a) 1 Rol. Rep. 437. S. C. Bridgeman, 59.

was on the fourth of May.—Though this comprehends more time than the submission, says the abridgment, stating the words of the court, yet because it shall not be intended that there were any matters between them, from the time of the submission, to that of the award, if it be not shewn on the other side, the award is good. (a) Rolle adds his own opinion, that this case seems to be good law, but that the reason on which the court relies, is not the true reason, because it *crosses* the reason given for the judgment in the case before; for there the award was held to be void, because there *might* have been other disputes between the time of the submission, and the award: but he says, it seems the reason of the present case is, that though there *were* other matters between the submission and the award, and so the award void for these, yet here there is not one intire act to be done, as in the case before of the release; but the 20s. shall continue a good satisfaction for the other matters submitted; and all the inconvenience is that perhaps the money to be paid was increased by reason of the intervening matters, and so he may sustain some prejudice, but no prejudice can be sustained on the other side.—The reason of the court, however, is more consonant to the principles of justice than that of Rolle—by presuming that there were no matters between the parties, from the time of the submission to that of the making of the award, the court suppose that the arbitrator had not in contemplation any injury for which he was to give a satisfaction, but those which were within the submission, and that the words seeming to comprehend something more, must be considered only as an inaccurate expression.—But the reason suggested by Rolle, is against the justice of the case; for if in truth the arbitrator, by considering other injuries than those submitted to him, had increased the satisfaction, beyond that which he would otherwise have given; and if the party notwithstanding that increase of damages, be not precluded from suing his opponent for those injuries which were out of the submission, the intention of the arbitrator does not prevail.

It is only by supposing that the arbitrators have not expressed

(a) M. 24. Car. B. R. Kynaston v. Jones. H. 15 Jac. Ley v. Payne. Hutt. 9. Mo. 885. pl. 1242.

their real meaning with perfect accuracy, that the following and many other similar cases can be supported, with a due regard to justice.

THE submission was by A. and B. of all suits between them, concerning certain tythes; the award was that A. should pay to B. a certain sum of money, and that B. should suffer all suits which he had against A. to be discontinued, when in fact he had other actions against A. which did not concern the tithes: the court held that the award, though void as to the discontinuance of the actions which did not concern the tithes, was yet good for the rest, "because the suffering, says Rolle, of the actions to discontinue, is not an intire act like the execution of a release." (a) But the only fair reason must be that the arbitrator had no other actions in contemplation than those concerning the tithes.

It is indeed laid down by Lord Coke, in general, unequivocal terms, "that though several things be awarded to be done in satisfaction of another, and some are within the submission, and some out of it and therefore void; and although all were intended by the arbitrators to be a plenary and intire recompence for the things done by the other, yet if any thing to be given or done to the party, though of small value, be within the submission, the award is good, though it appear to have been the intent of the arbitrators, that that which is within the submission, without the rest, should not be a plenary satisfaction for the thing to be done by the other party." (b)—But Justice Powell mentions this opinion of Lord Coke in terms of disapprobation, and says, that the judgment in the case which Coke had then in contemplation was afterwards reversed on a writ of error. (c) It well deserved his disapprobation; for if it were to prevail, the inadvertence or the blunder of an illiterate arbitrator might in many instances be converted into an instrument of the grossest injustice.

(a) Tr. 18 Jac. B. R. Ingram v. Webb. Rol. Arb. N. 4. 2 Rol. Rep. 162. Cro. Jac. 663, 664. Palm. 107.

(b) 10 Co. 131. b. 132. b. Rol. Arb. b. 22.

(c) 1 Leon. 170. Vid. 12 Mod. 587.

HOWEVER,

HOWEVER, when it appears that both parties have the full effect of what was intended them by the arbitrator, though something be awarded which is void; yet the award shall stand for the rest.

THUS, if it be awarded that the one shall pay the other 40s. in satisfaction of all matters between them, and that the latter shall give the former a release of all matters up to the time of the award, though the award be void as to the release, yet it shall stand as to the rest, because without the release, the mutuality intended by the arbitrator remains complete. (a)

So, an award, "that the plaintiff shall have and enjoy a certain horse which was in controversy between the parties, and that the defendant should pay him 3l. before Michaelmas, towards his charges, and that they shall release the one to the other all matters whatsoever, between the time of the award made and St. Michael," though void as to the release, would now be considered as valid for the rest. (b)

So, an award "to pay 10l. in satisfaction of trespasses, and that both parties shall give mutual releases to the time of the award," is good as to the 10l. because, by being in satisfaction of the trespass, the mutuality is complete without the release. (c)

THE submission was by bond in the penalty of 2000l. the bond of the plaintiffs was dated on the twenty-second of February, that of the defendant on the ninth of March; the award ordered that the defendant should pay to the plaintiffs 1200l. at four payments; that on the fourth of May he should enter into four bonds for the payment on the days appointed, and should then pay to the plaintiffs 30l. towards their costs and charges expended; that all actions and controversies between the plaintiffs and the defendant should cease and determine; and that they should seal and deliver to each other general releases of all controversies, suits and demands, to the eighth day of March.—The objection made to this award was that the releases being ordered to the eighth of March, the plaintiff's bond of submission, which

(a) Rol. Arb. M. 4. K. 9.

(b) Held contra formerly. *Stain v. Wild.* Cro. Jac. 332, 353.

(c) Freem. 265.

was dated on the twenty-second of February preceding, would be discharged by the defendant's release: but in this case the court thought that the question, whether the award as to the releases was void, was immaterial; because, it being awarded that all suits should cease, the award was reciprocal, and a sufficient satisfaction for the money ordered to be paid by the defendant. (*a*)

It was awarded that the plaintiff should pay 30*l.* to the defendant, and that the latter, on the payment, should surrender to the former, the possession of a house in which the defendant lived, and deliver to the plaintiff a deed, by which the house was intailed to the plaintiff, and deliver up all bonds which he had against him, and execute a general release to him, to the 12th of August, the submission bond being dated the 2d of July preceding, and that the plaintiff should then give a general release to the defendant.—It was objected that the award was not mutual, because the defendant being ordered to give his release first, the plaintiff might refuse to give that awarded on his part, and the defendant had no remedy to enforce it; because if he brought an action on the submission bond, the plaintiff might plead the defendant's release in bar: but it was held that whatever might be the effect of such a plea, the award was mutual without the releases, and no defect with respect to them should vitiate it. (*b*)

AN award consisted of the following distinct particulars. 1. That the defendant should pay all his own costs till the day of the submission. 2. That he should execute a general release to the plaintiff, of all actions, &c. unto or upon the same day. 3. That he should deliver to the plaintiff all the deeds mentioned in the award relating to the premises in dispute. 4. If he did not deliver them, then he should pay to the plaintiff 50*l.* 5. That the defendant should procure double sixpenny stamps to certain indentures relating to the premises. 6. That the defendant should pay to the plaintiff 1*l.* for the costs in the suit recited in

(*a*) *Kynaston and Spencer v. Jones.* Al. 87. Rol. Arb. N. 5.

(*b*) *Marks v. Marriot.* 1 *Ld. Raym.* 114, 5, 6.

the award, on or before the second day of May following, and give a bond in the penalty of 74*l.* with a condition to pay the said 11*l.* and that the plaintiff on the performance thereof should execute a release to the defendant of all actions unto or upon the day of the submission.

THOUGH the opinion of the greater part of the court was that the release to be made by the plaintiff to the defendant, would, if executed, have been a release to the submission bond; yet they were all of opinion that the award was good, because it amounted to a particular satisfaction, and mutual recompence as to each particular matter awarded. (*a*)

By an umpirage, it was ordered that all actions should cease.

2. That the defendant should pay to the plaintiff 12*l.* 15*s.* 3*d.*
3. That the defendant should deliver to the plaintiff certain goods particularly mentioned, and three boxes, and several books, without naming them; and that the plaintiff should deliver to the defendant several articles by name; but that, if any of the goods should be mislaid or lost, then the parties should pay the value of them, to be appraised by the umpire, and the arbitrators, and that the parties should execute mutual releases.—In an action on the bond for performing this award, the breach was assigned in the nonpayment of the 12*l.* 15*s.* 3*d.*

THAT part of the award, respecting the three boxes and *several* books was held to be void, as it clearly is, on account of the uncertainty as to the books; as to that part which relates to the appraisement of the goods, that might be mislaid or lost, by the umpire and arbitrators, doubts were entertained; some (*b*) holding that it was a judicial act, Powell that it was a ministerial act.—With respect to the releases awarded to be executed on both sides, it was resolved, that, although no time was limited for the execution, nor was it said, that it should be done, on or after the performance of the other parts of the award; yet the award being void, with respect to the delivery of the goods, neither the one nor the other was obliged to give the release, for then

(*a*) *Lee v. Elkin.* 13 W. 3. C. B. Lutw. 545.

(*b*) *Trevor, C. J. and Blencow, J.*

then the goods would be released without any satisfaction, which, as was said by one of the judges, would be absurd.

It was also held, that the submission in this case containing the provisional clause of "*Ita quod*," if the award was void for a part, it was void for the whole; and being void for that part relating to the delivery of the goods, it was void for the whole. (*a*)

THE proper way, however, of considering the case, seems to be this: that part of the award which gives 12l. 15s. 3d. to the plaintiff, and orders the delivery to the plaintiff of certain goods particularly mentioned, and three boxes, with several books, without particularising them, is altogether the consideration intended by the umpire for the delivery of the goods by the plaintiff to the defendant, and part of that consideration being void, the plaintiff could not be compelled to perform his part; consequently if the defendant had been held to the payment of the 12l. 15s. 3d. he could not have had that equivalent which the arbitrator intended him. But had the plaintiff alledged that he had delivered the goods awarded to be delivered on his part, it is conceived, no objection could have arisen on the part of the defendant on account of the releases, because without them the award would then, in every respect, have been mutual.

IN all the cases in which objections are made to the award, as wanting mutuality, on account of one part being void, the arguments are founded on the supposition that the defendant, on performance of his part, has no means of enforcing performance from the plaintiff of the part awarded to be performed by him in return; this strongly favours the argument, that where that objection is removed by an actual previous performance on the part of the plaintiff, the defendant shall be bound to perform his, where there is no reason to impeach the validity of that.—This opinion is confirmed by the reasoning of the judges in the case of *Lee and Elkins*. (*b*)—Powell, J. says there is a diversity to be observed; where an award consists of several things, for

(*a*) *Cockson v. Ogle*. 13 W. 3. Lutw. 550.

(*b*) 12 Mod. 588.

one of which it is void, and it is expressly said, that on performance of that which is void, the other party shall do some particular thing, there the performance of that, for which the award is void, is a condition precedent, and must be averred before the action against the other for not doing his part, can be maintained. But when there are several things in an award, for some of which it is good, and for others not, and it is further said, that on performance of the premises, the other party shall do something in return, there the words "on performance of the premises," shall only apply to that part of the award which is good, and performance of so much obliges the other to do what belonged to him. And, in the latter case, the opinion of Lord Hale seems to have been conformable to that of Powell. The award was that the defendant should pay to the plaintiff 10*l.* and that the plaintiff should pay to the defendant the expences to the making of the award, and that *then*, each should give to the other a mutual release : the breach being assigned in the non-payment of the 10*l.* by the defendant, it was objected that the award was not mutual, because it was void for the expences to be paid by the plaintiff, and therefore no release was ever to be given ; but Hale held that on performance of that, for which the award was good, the release ought to be given. (*a*)—But this distinction was, on good reason, denied by Chief Justice Trevor, who said, that in the latter case mentioned by Powell as well as in the former, if it appeared that the arbitrators designed that such illegal part should be part of the consideration, in respect of which the other was to perform, that illegal part must in fact be performed, otherwise the opposite party would not have that advantage which was designed for him ; and he would be injured by being forced to pay for a consideration, of which he had not the benefit.—Thus, if several things were awarded to be done on the part of the defendant, against which no objection could be taken, and also that he should give the plaintiff a general release, "unto and upon the day of the arbitration bond," and that then the plaintiff should give *him* a like general release ; though, by the Chief Justice, it was held that the release was void, as extending to the

(*a*) Pinkney v. Hall. 1 Lev. 3. 23 Car. 2.

the day of the submission, and so going beyond the submission, yet he held that the plaintiff was not bound to give the release on his part, independently of the same objection to its legality, unless the defendant first gave *his* release; but if the plaintiff averred performance on his own part, the defendant could not excuse himself from the performance of what was awarded to be done by him, merely on account of the illegality of the part to be performed by the plaintiff.

WHERE the submission is verbal, without a proviso that the award should be made in writing, a verbal award is sufficient. (a) *The Form of the Award.*

IF the submission be by bond, and the condition contain a proviso that the award should be made and ready to be delivered, either in writing or by word of mouth; a parol award is in this case also sufficient. (b) And where the proviso is merely that the award shall be made and delivered, it seems that it may be made without writing; (c) at least it is not necessary for the plaintiff to shew that it was in writing.—If the proviso be that the award be made in writing or by word of mouth before two witnesses, a verbal award alone will not satisfy the proviso, it must also be pronounced before two witnesses. (d)

IF the proviso be that the award shall be made and delivered under the hands and seals of the arbitrators, the award must be actually subscribed by them; sealing alone will not be sufficient. (e) But if the arbitrator make his mark, that is sufficient subscription. (f)

AND if the proviso be that the award shall be sealed with the seal of the arbitrator before a certain day, it will not be sufficient for the party pleading the award, to alledge that he has it in court sealed with the seal of the arbitrators, he must shew

(a) Cable v. Rogers. 3 Bulstr. 312.

(b) Hanson v. Liverfedge. 2 Vent. 240, 242.

(c) Rous v. Nun. 1 Sid. 155. vid. ante 74, 75 acc.

(d) Wilson v. Constable. Lutw. 536.

(e) Thaire v. Thaire. Palm. 109, 112, 121.

(f) 3 Salk. 44.

that it was sealed at the time of the delivery. (a)—But though, in the beginning of the replication, it be only said, that the arbitrators, by their writing sealed with their seals, awarded; yet if it be afterwards said, that it was ready to be delivered under their hands and seals, it will be sufficient to satisfy the proviso. (b)

It was formerly held that a proviso "that the award should be made by deed indented," was not satisfied by an award made in writing without being indented, and that even the acceptance of it by the parties unindented, would not alter the case. (c)—It was further held that an averment "that it was made according to the effect and form of the condition would not aid it, because that relates to the delivery to the parties, and *ſo*, it is said, *it hath been often adjudged*. (d) But the good sense of later times, has considered this objection as altogether immaterial, and of not more consequence than if the submission required the award to be made on gilt paper. (e)

WHERE there is a proviso that the award be made, "of and upon the premises," it is not necessary that the award should expressly purport to be made "of and upon the premises," for unless the contrary appear on the face of it, it cannot otherwise be intended.—This, at least, seems the true conclusion from two cases reported: where the submission contained that proviso, and if the arbitrators did not make their award within the time, then an umpire should decide; the arbitrators did not make any award within the time, but the umpire did, without professing to make it "of and upon the premises:" it was held that the proviso extended to the umpire, as well as to the arbitrators; but that though he had not professed to make his award "of and upon the premises," it was sufficient. (f)

Performance what shall be. It is not in all cases absolutely necessary that performance should be exactly according to the words of the award; if it be substantially and effectually the same, it is sufficient.

(a) Palm. 121. Jenkinson v. Al-
lenfon. 3 Keb. 513.

(b) Lambard v. Kingsford. Lutw.
358.

(c) Dist. per Hale in Elborough v.

Yates. 3 Keb. 125. adj. in Hinton
v. Cray. 3 Keb. 512.

(d) Burges v. Pleyer. Freem. 467.

(e) Barnes 56.

(f) 1 Keb. 790. 865.

sufficient.

ficient. Thus, if it be awarded that one of the parties should deliver, to the other, the last will and testament of his testator, it is sufficient to alledge a delivery of letters testamentary, because these are in effect the same thing. (a) Where it was awarded that one of the parties should "withdraw" his action, it was much debated whether his suffering a discontinuance would satisfy the award: the report of the case is far from being clear, (b) but the prevailing opinion seems to have been that it should not; for by this award, it was said, the party must do an act; he must come into court before the day which was given for the continuance, or before the return of the writ, and say that he will no further proceed in his action, on which the entry on the record is, "that the plaintiff comes in his proper person and says that he will no further proceed in this plea."

A DISCONTINUANCE, however, seems a sufficient performance of such an award, because it has the same effect as a retraxit; for though a retraxit be a bar to another action, which a discontinuance is not, yet by bringing another action after an award of a discontinuance, the party as much disobeys the award, as if he did the same after an award of a retraxit.

WHERE the award orders a release to a time beyond the submission, a release to the time of the submission is sufficient performance. (c)

PERFORMANCE by the attorney is equivalent to performance by the principal; as if the award be that the party shall discontinue his suit, a discontinuance by his attorney is sufficient. (d)

If it be awarded that one of the parties shall pay a sum of money to a stranger and his assigns before a certain day, and before the day, the stranger die, the party must pay the money to the executor or administrator; for these are the assignees in law; and the law is the same, where no mention is made of assigns, in the award. (e)

(a) 17 Ed. 4. 3. cited 3 Bulstr. 67. 6 Mod. 34, 35. 12 Mod. 8, 117, 589. et vid. ante page 162—165.

(b) 21 Ed. 4. 38, et seq.

(c) Godb. 164, 5. 1 Sid. 365.

(d) Jenk. 136. dict. contra of a retraxit.

(e) 3 Leon. 212.

WHERE the concurrence and presence of both parties is not absolutely necessary to the performance, each ought to perform his part without request from the other. (a) Thus, where the award was, that the defendant should reassign to the plaintiff certain premises mortgaged to him by the latter, it was held, he was bound to reassign without the presence or concurrence of the plaintiff, and if the mortgage had been of a fee, the reassignment might be done by lease and release. Had the award been that he should reinseoffe the plaintiff, he could not have performed without the presence of the plaintiff or some one on his behalf to take livery. (b)

WHERE an act is awarded which may be done two ways, but by the one, it cannot by law be done before a distant day, and by the other it may be done immediately, the party must do it in that way in which he may do it immediately, unless he has a time by the award, which goes beyond the distant day. Thus where the award was that one of the parties should grant the reversion of an estate held for term of life, this, before the statute for the amendment of the law, might have been done in two ways; by fine, or by deed, and attornment of the tenant for life, but the fine could not be levied before term, the reversion must therefore have been granted by deed, which might be done immediately; however, it must be observed, that, before that statute, the conveyance would not have been complete without the attornment of the tenant, which could not be compelled but by "*per quæ servitia*," or "*quem redditum reddat*;" and these could not be prosecuted with effect 'till the term: if, therefore, the party could not have completed the conveyance before term, he could not have been guilty of a breach of the award. (c)

It may sometimes be a question, when mutual things are awarded, who shall do the first act. On a submission of a battery committed by one of the parties against the other, if it be awarded that the offender shall pay a sum of money, and the other give

(a) *Nihil aliud esse, sententiæ stare, quam id agere, quantum in ipso sit, ut arbitri pareatur sententiæ. Ff. l. 4. t. 8. f. 23. n. 2.*

(b) *Rosse v. Hodges. 1 Ld. Raym. 233, 234.*

(c) 21 Ed. 4. 40—43. *quære*, for the report is very inaccurate,

him

him a release of all actions, or a release simply, there the payment of the money must precede the release, because, according to the old doctrine, such a release would have extended to the money awarded in satisfaction. But if the award be that the one shall pay money, and the other give him a release of "the" action, this not extending to discharge the payment of the money, and the remedy on the award remaining for the recovery of it, after the execution of the release, there is no precedency required, and the offender may sue on the award, and assign a breach in not executing the release without shewing that he has paid the money, nor will he be barred, by the other party's alledging the non-payment, in his plea. (a)

If the party, in whose favour the award is made, accept of a performance differing in circumstances from the exact letter of the award, that is sufficient:—thus, if it be awarded that the one shall infeoff the other, in a piece of land, and the latter come to him and require him to infeoff J. N. and himself, to the use of him and his heirs; if he make the feoffment accordingly, this is performance of the award, sufficiently within the intent, though not exactly within the words. (b) So, if the award be, that the defendant shall conduct the servant of the plaintiff to London, and the defendant, by the direction of the plaintiff, deliver him to A. B. at Salisbury to be conducted to London, this is sufficient. But where the submission bond was to a stranger, and not to the party in whose favour the award was made, it was held that such a performance would not save the penalty of the bond, because, by the law relative to bonds, he was bound to a strict and literal performance. (c) It was afterwards, however, decided on solemn argument, that in such a case, if the obligor did all he could to perform the award, and the party in whose favour it was made prevented the literal performance, this was sufficient, because when a bond is given to A. by B. conditioned to stand to A.'s award between B. and C. there is sufficient privity between the

(a) Bilford v. Flint. 2 Bulstr. 117. vid. 2 Keb. 163. 403. 3 Keb. 608. Sir T. Raym. 169.

(b) 36 H. 6. cited 3 Bulstr. 67.

(c) Id.

two latter to make the default of C. in whose favour the award is made, excuse B. (a)

BUT, without having recourse to that privy, it may be observed that in this respect the case of an award is different from a common bond, for by a bond to stand to an award, the obligor is only bound to perform the award in a reasonable manner, and it would be too much to say it was reasonable, he should compel the other party to accept performance.

IF the award be to pay on or before a particular day, payment before the day is equivalent to payment on the day, (b) and so one might suppose if the award were to pay on the day, without the word, "before." (c)

IF no day be limited for the payment of money awarded, it must be paid within a reasonable time, and the party to whom it is to be paid, is not bound to make a request before he bring his action for the recovery of it. (d) But it seems rather a strict construction, that if the party who is to pay the money let a considerable time elapse, the other should be at liberty to refuse it when offered, and be permitted, notwithstanding such tender and refusal, to sue on the submission bond.—Such strictness, however, was formerly adopted.—Money was ordered to be paid, by an award dated on the first of May. The plaintiff brought his action, assigning the breach in the non-payment of the money, the defendant pleaded a tender and refusal at Michaelmas, and the plea was overruled, because the time elapsed was too long. (e)—There is no doubt, however, at present, but that if the tender is actually before the commencement of the action, it is sufficient; and this is conformable to the civil law on the same subject. (f)

A CONSIDERABLE number of years having elapsed since the making

(a) 22 Ed. 4. 27. Brooke Arb. pl. 41.

(b) Hinton v. Crane. 3 Keb. 675, 6.

(c) Si arbiter, me tibi *certā die pœniam dare* jusserit, tu accipere noluisti:—posse defendi, ipso jure pœnam non committi. Sed si postea tu paratus sis accipere: impune me non datum; non enim ante feceram, Ff. l. 4. t. 8. f. 23. n. 3. f. 24.

(d) 21 Ed. 4. 38 et seq.

(e) Jenk. 136.

(f) Si dies adjectus non sit, inest quoddam modicum tempus, quod ubi præterierit, pœna statim peti potest; et tamen si dederit ante acceptum judicium, agi ex stipulatu non poterit. Ff. l. 4. t. 8. f. 21. n. 12. Utique nisi ejus interfuerit, tunc solvi. f. 22. Celsus ait,

making of the award, is no objection to the parties being called upon to perform it.

A TESTATOR left his son and brother executors; the testator was possessed of a considerable personal estate: the brother possessed himself of it, promising to give a just account, and that the son should have his share of it; but disputes arising between them, these were referred to arbitrators, and mutual bonds given to stand to the award: The arbitrators awarded that the personal estate should be equally divided between them, and that each should give the other a general release. The brother having the greatest part of the estate in his hands, promised to share it with the son, according to the award; the son relying on that promise, gave his uncle a general release, and wishing to have his share, to enable him to discharge some debts which he had contracted, applied to his uncle, who pretending that he had not money, borrowed 200*l.* of one Hody, and 300*l.* of one Holland, for which he gave his bond, and advanced 30*l.* of his own money, and took a mortgage from the son as a security for the payment of the 530*l.*—The son could never bring his uncle to account, and to divide the testator's estate according to the award.—When the son tendered to his uncle the 530*l.* with intention to have his mortgage delivered up, the latter declared that on a just and fair account there would be nothing due, and that therefore he should have his mortgage delivered up to be cancelled.—The brother made his will, appointing his wife executrix, and died. The widow proved the will, and the son exhibited his bill against her, praying that he might have his share of his father's estate as awarded to him: the defendant confessed the charge in the bill,

ait, si arbiter intra Kalendas Septembres dari jusserit, nec datum erit: licet postea offeratur, attamen semel commissam poenam compromissi non evanescere: quoniam semper verum est, intra Kalendas, datum non esse. Sin autem oblatum accepit, poenam petere non potest, doli exceptione removens, contra ubi, duntaxat dare jussus est. Idem ait, si jusserit *me tibi dare*, et valetudine siq. impeditus, quo minus

accipias, aut alia justâ ex causâ: Proculum existimare, poenam non committi nec si, post Kalendas, te parato accipere, non dem. Sed ipse recte putat duo esse arbitri præcepta; unum, *pecuniam dari*, aliud, *intra Kalendas dari*. Licet igitur, in poenam non committas quod intra Kalendas non dederis, quoniam per te non stetit; tamen committis in eam partem, quod non das. f. 23.

but

but said she believed her husband had performed the award, and insisted that she ought not, either as executrix of her husband, or otherwise, to be drawn into account; for that her husband lived twelve years after the award made; and said, that though Hody's debt was paid, yet she had been sued for Holland's, and had paid it, and that on payment of that and other sums expended by her, she was willing to assign the mortgage.

THE court decreed an account and distribution of what was awarded, as well as a redemption of the mortgage, but that the account of the mortgage should be taken apart and not attend the account on the award.—That the master should compute what money was due to the defendant, and on payment of that she should reconvey the mortgaged premises to the plaintiff. That the master should inquire whether the award had been performed by the brother, and if it had not, then that the defendant should be answerable in such manner as the master should appoint. (a)

What shall be a Breach of the Award. If the arbitrators award that a suit depending in Chancery between the parties, shall cease; it is no breach if the plaintiff in the bill file another in the same cause, if he do not sue out process on it; for it is said, till process be sued out, a suit is not properly depending, and till that time the defendant cannot be said to be molested: that this resembles the case of a counterbond from the principal obligor in an original bond to save his surety harmless; where though the original bond be forfeited, yet this in itself is no damnification, and the counterbond is not forfeited till some actual damage happen to the surety. (b)

If an award order that the defendant shall reassign to the plaintiff certain mortgaged premises, it will be a breach if he do not reassign without request. (c)

AN award that all suits shall cease between A. and B. does not extend to suits, between A. on one side, and B. and a third per-

(a) Sweet v. Hole. Ca. Temp. 98. 1 Rol. Rep. 7. 8. Cro. Jac. 340. Finch, 384. Brownl. 122.

(b) Freeman v. Sheene. 2 Bulstr. (c) 1 Ld. Raym. 234.

son on the other, and consequently the prosecution of a suit between such parties is not a breach of the award. (*a*)

A CONTINUANCE from term to term is no breach of an award that the plaintiff in an action shall not prosecute or proceed during the same term. (*b*)

IT was awarded that the defendant should pay to the plaintiff 8*l.* or 3*l.* and costs of suit in an action of trespass between the plaintiff and defendant, as should appear by a note under the attorney's hand, "at the pleasure of the defendant."—The question was, whether the defendant was bound to procure the note of the attorney, and to make his election, or the plaintiff was bound to tender him the note, before he could bring his action and assign a breach in the non-payment of the one or the other. This question, it was argued, depended on another, which was this; whether, in the present case, the attorney was to be considered as a stranger to the plaintiff; for if he was, it was not incumbent on the plaintiff to give notice to the defendant of the sum due by the note, but the latter was, at his peril, to procure it from the attorney; but, if the attorney was to be considered as the servant of the plaintiff, and it was in his power to compel him to deliver the note, then the defendant was not bound to make his election till that was delivered to him.—The judges were at a loss how to determine, and the court not being full, the question was adjourned.—But afterwards the subject was resumed, and judgment given in favour of the plaintiff, on the principle, that, though the attorney is to many purposes the servant of the principal, yet in the case before the court, it did not lie in the knowledge of the plaintiff, to what the sum amounted, and he could not compel the attorney to make the note. (*c*) But this judgment is open to some observation.—Must not the attorney be considered as the agent of the plaintiff? and, if he had refused to make the note, at his request, might he not have been compelled, by an application to the court for that purpose?

IF, by an award made in the middle of a term, it be ordered that one of the parties shall cease a certain suit which he has against

(*a*) *Barnardiston v. Fowlyer*. 10 Mod. 204, 5.

(*b*) *Gray v. Grey*. Cro. Jac. 525.

(*c*) March. 109, 157.

the other; it may appear trifling to lay it down, as an important point, that it will be a breach in the plaintiff in the suit to prosecute it to judgment afterwards in the same term: but it was, in truth, seriously argued that this was no breach of such an award; because, by fiction of law the judgment relates to the first day of the term, and therefore the award being made in the middle of the term, was of a thing which it was impossible for the party to perform; the suit having ceased by the judgment, by relation, before the award was made.—And such is the imbecility of the human mind, when its views are contracted by the technical dogmas of a single science, that the judges, instead of rejecting this as mere jargon and absurd nonsense, very gravely observed, that though by fiction of law, every judgment related to the first day of the term, yet as the plaintiff had in his declaration expressly averred that the defendant, after the time of the award made, had continued to prosecute his suit to judgment, and though it appeared to be of the same term, yet the defendant ought to have taken advantage of it, by special demurrer. (a)

If an award be that the one shall make a lease for a term of years to the other rendering rent, and the lease be accordingly made, and the tenant do not afterwards pay the rent, this is no breach of the award on the part of the tenant, nor is his submission bond forfeited; the remedy of the lessor for his rent is the same as in every other case of landlord and tenant; the award was completely performed by his acceptance of the lease with the rent reserved. (b)

So, if it be awarded that the defendant enter into a bond for the payment of money to the plaintiff at a future day; if he give the bond, that is performance of the award, and by non-payment at the day, he will forfeit only the bond awarded, not the bond of submission. (c)

So, in the case of an award to give a note for the payment of money, the giving of the note accordingly will be performance,

(a) *Huys v. Wright.* 1 Jac. Yel-
verton 35.

(b) *Bcnl.* 15. pl. 16. 27 Hen. 8.

More. 3. pl. 8, there said to be
28 Hen. 8.

(c) *Str.* 903. 1 *Barnard.* 463.

and the plaintiff must on non-payment be confined to his action on the note. (a)

IF an award be made between the grantee of a rent and the terre-tenant of the land out of which the rent issues, "that the grantor shall stand acquitted of the rent," the grantee is not bound by this to give the tenant a release; it is sufficient if he never pursue any remedy for the recovery of the rent, by action or distress. (b)

C H A P. VI.

THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD OR UMPIRAGE IS PROPERLY MADE.

IN the Roman law, the only remedy which either party could have against the other for disobedience of the award was to sue for the penalty expressed in the submission. (c) But with us the remedy is various, according to the various *forms* of the submission.

THOUGH the submission be verbal, it has been seen, (d) that in all cases an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act; where it was of the latter kind, however, it was not but by slow degrees that it was held that the act of submission implied in itself a promise to perform the award; before the courts went so far, they held that the promise was collateral to the submission, and that where it was laid to have been made at the *same time* with the submission, proof of the latter might have been considered by the jury as a foundation for presuming the former: but if the promise had been laid to have been made at any other time, though on the same day with the submission,

(a) Booth v. Garnett. Str. 1082. | (c) Vid. p. 5. 6.

(b) 2 Bulstr. 96. | (d) P. 8.

then.

then in an action on the case, proof must have been given of an actual promise. (a)

WHERE the award, on a parol submission, is for the payment of money, the action on the award may be an action of debt as well as where the submission is by deed, and as well where the award is verbal, as where it is in writing. (b) It may also be an action of *assumpsit*: in all other cases on a parol submission, an *assumpsit* is the only species of action that will lie.

WHEN the courts would not support an action on an award of a collateral thing, where the submission was verbal, unless there were actually mutual promises to stand to the award, on consideration of a certain specific sum, it was, of course, necessary that the declaration should run in some such form as this; "Whereas certain differences subsisted between the plaintiff and the defendant, and they had submitted themselves to the award of J. S. concerning the premises, and in consideration of 6d. given by the one to the other, the one assumed to the other to stand to his award," that assumption being stated in the terms of it. (c) When mutual promises only were held to be a sufficient foundation for this action, it was no longer necessary to state any consideration for them in the declaration: when the act of submission was of itself considered as an implied promise to perform the award, it became of course sufficient to state the submission.

IN all actions on the award however, whether debt or *assumpsit*, it must necessarily be shewn that the parties submitted, before the award can be properly introduced; and that submission must be shewn in direct, unequivocal terms; 'that the arbitrator was nominated "on behalf" of the defendant,' is not sufficient; it must appear that he was in effect nominated by the defendant, which, the former expression, it is said, does not sufficiently im-

(a) Vid. *Read v. Palmer*. P. 24 Car. Al. 69, 70.

(b) I do not find any direct authority for this, but the general tenor of the cases seems to justify the conclusion.—*Smith v. Kirfoot*. 1 Leon. 72. and *Ormlade v. Coke*. Cro. Jac.

354, are actions of debt on the bond, but it does not appear whether either the submission or the award was verbal or in writing.

(c) Vid. *Goodman v. Fountain*. Cro. El. 861. *Colston v. Harris*. Id. 904.

port, for the nomination may have been by some friend, to which the defendant might not have consented. (*a*)

It is also said, that it must appear for what cause the parties submitted; (*b*) perhaps the reason may be, that it ought to appear whether the award be according to the terms of the submission.

THE submission, too, must be so stated as to correspond with the award and support it; otherwise the plaintiff cannot have judgment; therefore, where the declaration recited 'that certain differences had arisen between the plaintiff and the defendant, and that they had submitted to the arbitration of J. S. who had awarded, "of and upon the premises," that the defendant should pay to the plaintiff 30*l.* in satisfaction of all sums due to him out of the estate of one Woolly,' and the breach was assigned in the non-payment of this money; though a verdict was given for the plaintiff, yet the judgment was arrested, because it did not appear by the submission as recited, that the defendant was executor, administrator, or trustee for Woolly, or that he had any thing of his, or had submitted on his behalf. (*c*)

WHEN the action is on a mutual assumpsit to pay a certain sum on request, if the defendant should not stand to the award, an actual request to pay that sum, before the action brought, must be stated; for in a case like this the request is an essential thing to intitle the plaintiff to his action; and there is a difference between a mere duty and a collateral sum; in the first case, as where there is a promise to pay on request, all sums lent to the defendant, no actual request is necessary; the bringing of the action is a request; but in the latter case, an actual request is necessary, because the promise of payment on request is as a penalty, and collateral. (*d*)—And the averment "that though requested he had not paid," is not a sufficient allegation of the request made; it must be shewn, by positive affirmation, to have been made before the action brought. (*e*)

(*a*) Dilly v. Polhill. 2 Str. 923.

(*b*) Brooke Arb. pl. 34, cites 5 Ed. 4. 1. which seems a wrong citation.

(*c*) Adams v. Statham. 2 Lev. 235. 2 Show. 61.

(*d*) Birks v. Trippet. 1 Saund. 33. 2 Keb. 126.

(*e*) Semb. for in the case here cited the words "tho' requested" were inserted.

IN an action on the assumpsit to perform the award, the plaintiff may assign several breaches; this case is not like that of a penal obligation, in an action on which at common law, one breach only could be assigned, that being sufficient to forfeit the obligation; but, in the assumpsit, only damages are recoverable according to the extent of the loss sustained by the plaintiff on account of the non-performance, and that may arise on every breach. In such a case, however, if one of the breaches be assigned in non-performance of a part of the award which is void, and intire damages be given, the judgment will be arrested: thus, when an award of a release to a time beyond the submission was held to be void, if it had been awarded that the defendant should pay 15*l.* to the plaintiff in satisfaction of a judgment, and that he should also release to him all demands to the time of the award; and in an assumpsit on this award, the breach had been assigned in non-payment of the money, and in not giving the release, if then intire damages had been given, a judgment on that verdict would have been erroneous. (*a*)

WHEN the submission is by bond, if the award be for the payment of money, an action of debt on the award lies, as well as an action on the bond; (*b*) but the latter is the action most usually brought, in which the order of pleading commonly observed is, that the plaintiff declares on the bond as in ordinary cases of actions on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators or the umpire made "no award;" then the plaintiff replies, not barely alledging that they did, but setting forth the award at large, and assigning the breach by the defendant, and on that the whole question arises as on an original declaration.—The defendant then either rejoins that they made "no *such* award," on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer. (*c*)

WHERE by the condition of the bond, the award must be made before a certain day, the defendant, instead of pleading

(*a*) Jenk. 264. vid. Yelv. 35 a dictum which seems contra, with respect to the intirety of the damages.

(*b*) Vid. Str. 923. Freem. 410, 415.

(*c*) 5 Ed. 4. 108. Brooke pl. 33. simply

simply that no award was made, may plead that no award was made before that day, because he is not bound to perform an award made after it; then the plaintiff in his replication must allege the award, which he sets forth, to have been made before the day. (a)

THE plaintiff must indeed shew that the award was made within the time limited, whether the defendant plead in this manner or not; for without that, his right of action will not be completely stated. (b)—But an allegation under a “videlicet” will be sufficient: thus, “that the arbitrators, after the execution of the bond, and before the exhibiting of the plaintiff’s bill, videlicet, on such a day, made their award,” is sufficient. And a distinction is taken, between a case, where the words under the “videlicet” are repugnant to the preceding matter, and where they are not; in the former they are merely surplusage, and must be rejected; in the latter, they are an affirmation sufficiently positive that the award was made, on the day mentioned after the “videlicet,” and no other day can be presumed. (c)

To this the defendant cannot rejoin, by saying that the arbitrators gave him no notice before the day, of any award made; for independently of any objection that might be made to the substance of the rejoinder, on account of the arbitrators not being bound to give notice of the award, (d) it is a departure from his plea, by which he had denied the existence of any award at all, before the day. (e)—In one book, we are told, that if the defendant wish to avail himself of want of notice, he must set the award forth in his plea, and then aver that he had no notice of it before the day. (f) This, however, seems an inconsistency; for how can he set forth that of which he had no notice? and if in fact he be enabled, at the time of his plea, to set forth the award, he will still, in many cases, be bound to perform it, though he had no notice on the day when it was made. The plaintiff too, might take issue on the fact, whether the defendant knew of the award before the commencement of the action.—

(a) 31 H. 8. Brooke Arb. pl. 42.

(b) 1 Sid. 370.

(c) 1 Saund. 169. 2 Keb. 361, 388.

3 Bur. 1729, 1730.

(d) Vid. p. 67—73.

(e) Keilw. 175. a.

(f) Id. ibid.

And it appears, by subsequent resolutions, that, where the condition of the bond contains a proviso, "that the award should be made and delivered to the parties, on or before a particular day," by which a delivery accordingly becomes essential to bind the parties, the defendant "protesting that no award was made," may alledge as a plea, "that after the making of the bond, and before or on the day appointed, no award was delivered to the parties, of or upon the premises, specified in the condition of the bond. (a)

If the plaintiff can contradict this plea, it is said, that he must do it in direct terms, alledging expressly that the arbitrators made their award, setting it forth with certainty, and that they delivered it to the parties in writing within the time limited. —It will not be sufficient, it is said in some places, (b) to alledge the delivery, by way of inducement, in such terms as these, "That the arbitrators having, at such a time and place, undertaken the burthen of the award, after the execution of the bond and before the day appointed, by their award made in writing, and *then* and there delivered by the said arbitrators to the said parties awarded, &c." It is however only said, in this case, that all the justices argued against the plaintiff, but no judgment was given. —In another book, (c) it is adjudged that the allegation of delivery in this manner by inducement is sufficient.

THE proviso contained in the condition of the submission bond was, that the award should be made and ready to be delivered by three o'clock in the afternoon of the sixth of April: the defendant pleaded that the arbitrator made no award of the premises before three o'clock of the day aforesaid in the condition aforesaid specified: it was objected that this plea was uncertain, because there were two moments of time which might satisfy the words three o'clock; and the award might have been made before three o'clock in the afternoon, though it was not made before three in the morning; the court held that this would have been a good exception, if the plaintiff had demurred for

(a) Bendl. 39. Benl. 108. 2 Keb. 402.

(b) Dyer 243. b.

(c) Cro. Jac. 285.

this cause, but as he had replied, the objection was not now open to him. (a)

EVERY thing necessary to shew that the award was made according to the terms of the submission; must be stated by the plaintiff; as, if the submission contain a proviso that the award be made in writing or *ore tenus* before two witnesses, it is not sufficient to set forth an award alledging it to have been made *ore tenus*; it must also be said to have been made before two witnesses. (b)

So, formerly if the proviso had been that the award should be by deed indented, the plaintiff must have alledged it to have been so; otherwise it was thought, it would not have appeared that the arbitrators had pursued their authority. (c)

So, where the condition contains a proviso that the award be put in writing under hand and seal of the arbitrators; in pleading it must be said to have been made under *hand* and seal, and not under seal only. (d)—But, when the proviso requires that the award shall be *ready* to be delivered, it is not necessary to alledge that it was *ready*; it is sufficient to say that it was made; the allegation of the latter implies the former. (e)

BUT where the proviso was, that the award should be made and ready to be delivered on or before a certain day, at a certain shop in London; and the plaintiff shewed an award made at York, saying that it was ready to be delivered at the shop in London, this was adjudged to be a void publication and delivery, because a particular place was appointed, where the parties were to expect it, and not elsewhere. (f) It has also been held that, in this case, an "averment that the award was ready to be delivered according to the form of the condition," was not sufficient, for that it must be said at the very place; and that a

(a) *Bedam v. Clarkson.* 1 Ld. Raym. 123, 124.

(b) *Wilson v. Constable.* Lutw. 536.

(c) 2 Keb. 156. but see page 180.

(d) 1 Bulstr. Scot v. Scot. Traire v. Traire. 2 Rol. Rep. 243. Sallows

v. Girling. Cro. Jac. 278. 2 Mod. 77, 78.

(e) 1 Keb. 739. 1 Lev. 133. 6 Mod. 82. 2 Ld. Raym. 989.

(f) Vid. *Hardres* 399. 1 Show. 98, 242. *Carth.* 158. 3 Mod. 330. Ld. Raym. 115. *Freem.* 416. 2 Rol. Rep. 193, 194. Cro. Jac. 578.

delivery at another place would not be sufficient, notwithstanding the party's acceptance, though it was observed that the insertion of a particular place in the proviso, was only that the parties might go there to see the award. (*a*)

IT is not necessary to state the date of the award; if it be alleged to have been made on a day which is within the time of the submission, that is sufficient, and then it shall be intended to have no date, and shall be considered as binding from the day of the delivery. (*b*)

IT is held, in a great many books, that the plaintiff must mention the place where the award was made, because, it is said, the place is issuable, and matter of substance; (*c*) however, it is allowed to be sufficient, if the place appear by way of recital. (*d*)

IN introducing the award, after having stated that the parties submitted to the award of the arbitrators by name, it will be sufficient afterwards to say, that the aforesaid arbitrators, without repeating their names, proceeded to consider the matters, and made their award; because the word "aforesaid" refers to the arbitrators mentioned before; and for the same reason, wherever in any subsequent part of the pleadings they are introduced, it may be done by the same epithet without name. (*e*) But if the name be mistaken in any part, that, it is said, will render the pleading bad. In setting forth the condition, it was expressed to be, to stand to the award of two by name, and if they made no award, then to the umpirage of "Randolfe" Wulley; the defendant pleaded, that neither the aforesaid arbitrators, nor the said "Ranulf" Wulley, made any award: this was held not to be a good plea, because Ranulf was not the same name as Randolfe, and the word "aforesaid" prefixed to Ranulf was not sufficient to remove so weighty a difficulty in the opinion of two of the judges; (*f*) though another (*g*) took a distinction between the making of the award itself, and the manner of pleading it, ob-

(*a*) *Elborough v. Yates.* 2 Keb. 374. 3 Keb. 69, 125. But the judgment is reported contra in 2 Lev. 68.

(*b*) 6 Mod. 244. 2 Ld. Raym. 1076. Salk. 76, 498. 3 Bulstr. 312.

(*c*) *Vid. Cro. El.* 758. 2 Vent.

72. et *vid.* 9 H. 6. 5. and *Cro. El.* 66.

(*d*) 2 Keb. 390.

(*e*) *Lumley v. Hutton.* 1 Rol. Rep. 271.

(*f*) *Coke and Houghton.*

(*g*) *Dodderidge.*

serving,

serving, that where the submission was to Randolfe, and the award was made by Ranulf, this was another man, but it seemed otherwise in pleading, for here the word afore said ascertained Ranulf to be the same man as Randolfe.

It was anciently held, that the plaintiff, after setting forth the award, must shew that he had himself performed that part which he was ordered to perform, unless by the terms of the award the performance on the part of the defendant was to precede the performance by the plaintiff. (*a*)

BUT now there are only two cases in which the plaintiff must even suggest performance on his part: the first is where the part awarded to be done by him is void, and cannot be enforced by the law, and unless he avers performance, the defendant may object to the whole award for want of mutuality. (*b*) The second is where, by the terms of the award, performance on the part of the plaintiff is a condition precedent to that on the part of the defendant; for there he must shew that he has done every thing necessary to intitle him to call on the opposite party. But tender by the plaintiff, and refusal by the defendant, will be sufficient, unless the thing to be done by the plaintiff can be done without the concurrence of the other.

THUS, where the submission was concerning certain lands, and the arbitrators awarded that the plaintiff should, on the second of March then next following, pay to the defendant 7*l.* 10*s.* for every acre of the land, to be measured by an able measurer in the presence of the arbitrators and umpire, or some or two of them, after the rate of seven yards to the pole; on payment of which, the defendant, his heirs or assigns, should pass, convey, or surrender to the plaintiff or his heirs, or such as he should appoint, all the said lands, with warranty against the defendant and his heirs, and all claiming under him; or in default of such payment, the plaintiff and his heirs should seal and deliver a release of all his claim to the said lands, and every part of them, and a general release of all actions, suits, and demands: the plaintiff having

(*a*) Vid. Brooke 45. pl. 22. vers. finem and the year books passim.

(*b*) Vid. ante p. 168 et seq.

stated this award, averred that it had been tendered to the defendant on the day limited for the making of it by the submission, according to the effect of the condition; he also averred an ad-measurement made the same day, according to the effect of the award, on which the lands were found to contain 12 acres, at the rate of seven yards to the pole, and 80*l.* were the sum to be paid, which he had tendered accordingly, but which the defendant had refused to receive, and that the plaintiff had requested him to pass a surrender to him and his heirs, which he had also refused. This appears to have been thought the proper mode of pleading in this case. (*a*)

A DISTINCTION is taken with respect to the manner of declaring in an action of debt on the award itself, and the manner of setting forth the award in the replication in an action on the submission bond; a distinction which, when it was insisted on that every award should appear on the face of it to be mutual, was of more importance than it is at this time.

IN declaring on the award, it is not necessary to set forth any more of it, than is sufficient to support the plaintiff's claim to the money awarded: it was not necessary, even in former times, in this action, to shew an award that was mutual; if the defendant wished to impeach it, by shewing that it was not mutual, or that there was any thing by way of condition precedent to the payment of the money, he might do it by pleading. (*b*) But in an action on the bond, the award must have appeared to be mutual, as set forth by the plaintiff. In an action on the award too, the plaintiff might declare, that *among other things* it was awarded: whereas on the bond, "*among other things*" would have vitiated the replication. (*c*) Farther than this the distinction does not appear to be very essential; for, in every other respect, the mode of taking advantage of any variance between the award set forth and the real award, is the same; as is also the effect of that variance, whether it be material or not,

(*a*) Hunter v. Bennison. Har-
dres. 43, 44.

(*b*) Smith v. Kirfoot. 1 Leon.
72. Leake v. Butler. Litt. 312, 313,

cited 1 Bur. 281. vid. 1 Rol. Rep. 437.

(*c*) Vid. Litt. 312, 313. 1 Mod.
36. Comyns. Tit. Arbitrament, I. 2.
I. 5.

If the plaintiff set forth the award with a *profert in curia*, the defendant craves oyer, and demurs for the variance; if the plaintiff set forth the award without the *profert*, the defendant answers "no such award," on which issue is joined: if, on the demurrer, the award set forth vary materially from the real award, judgment will of course be given against the plaintiff: if, on the issue joined, the award set forth differ materially from that given in evidence, the judge will direct the jury to find for the defendant; if there be no material variance, in the one case *judgment*, and in the other a *verdict*, will be given in favour of the plaintiff. In the case of a general verdict in his favour, it must be presumed, that there was no material variance; if at the trial it be doubted whether the variance be material or not, a special verdict may be taken, and the question argued in court, as on a demurrer. (a)

THE form of declaring in debt on the award is said to have been taken from a writ in the register, in which so much only of the award is set forth as is necessary. (b) That writ, however, is very far from justifying the assertion. It is a writ in trespass on the case, sued by the party against whom the award is made for the payment of money to the other at a future day, against that other for having sued for the money before the day appointed. (b)

THERE is a distinction better founded, with respect to the defendant's plea, that he did not submit. In the action on the award, there is nothing which can preclude the defendant from the benefit of this plea: before he can plead at all, the plaintiff must have shewn every thing necessary to maintain his action,

(a) *Foreland v. Marygold.* 1 Salk. 72. *S. C.* *Foreland v. Hornigold.* 1 Ld. Raym. 715. *Perry v. Nicholson.* 1 Bur. 278.

(b) Per Ld. Mansfield. 1 Bur. 280. and in Litt. 312, 313.

(b) —*Ostensus quare cum iudem B. et C. pro certis debatis inter ipsos motis, in arbitrium T. et E. ad hoc per ipsos B. et C. electorum in omnibus se posuissent et submisissent, et licet iudem arbitratore præfatum B.*

ad decem libras solvendas eidem C. ad certos terminos nondum elapsos arbitrati fuissent et adjudicassent: prædictus tamen C. pro debito prædicto versus præfatum B. coram præfatis iustitiariis prosequitur, et ipsum B. ea occasione laboribus variis et expensis plurimis multipliciter fatigat et inquietat minus iuste, in ipsius B. damnum non modicum et gravamen ut dicit, &c. Reg. 111. a.

and the defendant does not contradict himself by pleading that he did not submit; but in an action on the bond, such a plea is not good. The plaintiff, in his declaration, only sets forth the bond, from which it does not appear from what cause it was given; the defendant cannot therefore, at that period, immediately plead that he did not submit, because by so doing he will shew that he knows the condition of the bond to contain his submission; when he prays oyer of the condition, and that is consequently given; he cannot then plead that he did not submit, because the condition implies that he did: if he wishes to have the effect of such a plea, he must plead that it is not his deed. (a)

MORE exactness is required in setting forth a written than a verbal award; the former must be stated more particularly, every reference being to some particular part of the award itself, and not to any thing alleged by inducement. But it is not necessary that a verbal award should be so exactly shewn, because it may be very difficult to prove the precise words; the effect and substance is sufficient: thus, where the plaintiff, by inducement, alleged that, at the time of the submission, there was a certain suit depending between him and the defendant, and then stated that the arbitrators having undertaken the burthen of the award, ordered, among other things, that the defendant should pay to the plaintiff all such monies as he had expended about the "suit aforesaid:" it was held that this shewed sufficiently that the award was made of the action mentioned by inducement. (b)

WHERE the submission is to arbitrators, and in their default to an umpire, the defendant, after oyer of the bond and condition, must not merely say that the arbitrators made no award, but that neither they nor the umpire made any, otherwise his plea will be incomplete, and the plaintiff may demur to it: but if, instead of demurring, he choose to reply, it is not necessary for him to take any notice of the arbitrators, but he may immediately set forth an award made by the umpire. (c)

AFTER stating the award, the plaintiff must assign a breach by

(a) Keind v. Carter. 2 Keb. 73. | 242. Vid. the pleadings in that case,
1 Sid. 290. Vid. 2 Str. 923. | (c) Hinton v. Crane. 3 Keb.
(b) Hanson v. Liversedge. 2 Vent. | 675,

the defendant; for the breach is the cause of action itself, and unless that be assigned the defendant may demur to the replication; the plea of "no award" is a total denial of all cause of action, and therefore the plaintiff does not answer it without shewing a breach. (a) And if the defendant, instead of demurring, rejoin that the award set forth is not the deed of the arbitrators named, or that they made "no such award;" though the fact be found in favour of the plaintiff, yet he shall not have judgment, because on the whole of the record, no cause of action appears. (b)

If after setting for the whole award, the plaintiff assign the breach in a part which is void, the effect will be the same as if he assigned no breach at all; but though part of the award set forth be void, yet if, notwithstanding that, the remainder be good, an assignment of a breach in any part of the latter will maintain the action. Thus if the award be, that the defendant and another shall enter into a bond to the plaintiff; this being void as to the stranger, the breach must not be assigned, "that the defendant and the stranger did not enter into the bond," but "that the defendant himself did not enter into it." (c)

WHERE money is awarded to be paid, on or before a particular day, it has been held that, in assigning the breach, it must not be merely said, that it was not paid on the day; it must be added that it was not paid before the day; and this is said to be the neatest way of assigning the breach in this case. (d) But in another case, where an objection of this kind, seemed to be that which most affected the manner of pleading, it was held that an allegation of non-payment on the day implied that it was not paid before the day. (e) Perhaps a distinction may be made, between an allegation of payment *on* the day, in the active or in the passive voice; if it be said that "he did not pay" on the day, that applies to the simple fact of payment at that particular time, and does not imply that he did not pay before: but "that the money was not paid by him" on the day, implies that it remained yet

(a) Wynche. 121. Yelv. 24, 78.

(b) Barret v. Fletcher. Yelv. 153.

(c) Godb. 165. 3 Bulstr. 313.

3 Keb. 601. 1 Ld. Raym. 114, 123,

234. 2 Mod. 309. 12 Mod. 585.

(d) 12 Mod. 585, 6.

(e) Bridg. 91.

unpaid.—However without adverting to such a distinction, it has since been held that though payment before the day will be good evidence of payment on the day, where payment on the day is pleaded; yet, in pleading, parties ought to pursue the words of the condition. (a) By the latter words, I suppose, it is meant that the plaintiff in assigning the breach should follow the very words of the award. However the breach will be sufficiently assigned by alledging that the defendant did not pay according to the form and effect of the award aforesaid; the rule of pleading in such a case, being that where the day of payment or performance appears before on the record, there, in averring performance or in assigning a breach for the want of it, the day needs not be specifically mentioned, but it may be ascertained by a reference to a former part of the record. (b)

If the award set forth, be that the defendant, at a certain place, and between certain hours, shall pay the plaintiff a sum of money; in assigning a breach for non-payment, the plaintiff must not only shew that he himself went to the place between the appointed hours, and that the defendant was not there, he must also shew that he continued there till the last moment; it is not to be presumed, till the contrary be shewn, that he continued there till the last moment; for the defendant has no opportunity of shewing the contrary by a rejoinder, because that would be a departure from his plea of “no award made.” (c)

It was awarded that the defendant, on the delivery of the award, should pay the plaintiff 22l. 2s. 10½d. In an action on the submission bond, on “no award” being pleaded by the defendant, the plaintiff assigned the breach by averring the delivery on such a day, and the non-payment on the delivery.—The defendant demurred, and it was insisted on his behalf that the breach was not well assigned, because though it was ordered that the defendant should pay the money on the delivery of the award, yet the law, by a reasonable construction, would allow him a convenient time for payment, the award might have been delivered to him

(a) 2 Vent. 221. 3 Lev. 293.

(b) Lutw. 545. 12 Mod. 586.

(c) Fitzgib. 54, 55. 1 Barnard. K. B. 151.

on his journey on the highway, at a great distance from his habitation, when it could not be presumed he had money to pay; and if this construction were allowed, then the breach was assigned too strictly: it ought to have been that the money was not paid on the delivery of the award, nor at any time after. But the majority of the court were of opinion that the breach was well assigned, and that it should not be intended that the money was paid after; and if in fact, it had been paid, within a reasonable time after, it ought to have been so pleaded by the defendant. (a)

IF the award be that the defendant shall pay a sum of money to the plaintiff, when he shall be requested; in the assignment of the breach in non-payment, a request must be directly stated, because, by the award, the money is not due, but on special demand; there being a difference in this respect between a debt due on bond or on contract, where no demand is necessary, and the cause of an award; and therefore an allegation that though often requested, the defendant has not paid, will be sufficient in the former case, but not in the latter. (b)

THE breach must always be assigned with such precision, as to shew that the award was made of the thing in which the breach is alleged: therefore, where the plaintiff, in his replication, alleged that the defendant had filed a certain bill in Chancery against him, setting it forth in the words of the bill, and that afterwards they had submitted to arbitrators, who awarded that a "certain" suit which was depending in Chancery between them should cease, and then shewed that the defendant had since filed another bill, averring that both bills were for the same matter: this was held to be badly pleaded, because it did not appear that the award was made concerning the first bill, as the defendant might have several bills in Chancery against the plaintiff. (c) But it was admitted that if he had said, that the arbitrators had awarded that the "said" suit should cease, this would have shewn that the award related to the particular bill set forth.

(a) Strong v. Saunders. Lutw. 329.

(b) Waters v. Bridges, Cro. Jac. 640. vid. Rodham v. Stroher. 3 Keb. 830.

(c) Freeman v. Sheene. 1 Rol. Rep. 8. Cro. Jac. 339. Brownl. 122. 2 Bulstr. 93.

If the award be to pay the rent mentioned in a certain indenture, in assigning the breach, it is not necessary to set forth the indenture at large—but if it be that the rent shall be paid in such manner and at such times as is expressed in the indenture, then the indenture must be set forth at length, or the manner and time particularly described. (a)

WHERE the award is in the alternative that the defendant shall do one thing or another; in assigning the breach upon this, the plaintiff must say that he has neither done the one nor the other, because if he has done either, he has obeyed the award. (b)

WHERE several things are ordered to be done by the defendant, the plaintiff, it is said, can assign a breach only in the non-performance of one where the action is on the bond, because an assignment of two breaches will be liable to the objection of double pleading. (c)—In a case, however, which occurred in the sixth of the present king, it is only said that it is not necessary to assign breaches of every matter in an award, because the breach of any one is a forfeiture of the penalty of the bond; that if the breach be well assigned in one point, for which the award is good, the plaintiff must have judgment on demurrer for the whole penalty of the bond, and when he has once recovered that, he can never maintain another action, on the same bond, to recover the penalty again, on a second breach. (d)

WHERE the award is for the payment of money, and the plaintiff brings his action on the submission bond, but does not properly assign the breach, the court, it is said, will not in general grant him leave to discontinue, unless under peculiar circumstances, because he may have his remedy on the award itself. (e) It appears, therefore, that judgment against the plaintiff, in one form of action, arising from mistake in the pleadings, is no bar to another.

(a) Anon. 1 Vent. 87.

(b) Semb. contra. Sav. 120, where one of the things is void.

(c) 21 H. 6. 18. b. Comyns Dig. Arbit. I. 6. The St. 3 and 9 W. 3. c. 11. s. 8. with respect to the assignment of several breaches in actions on

bonds for the performance of covenants, &c. does not seem to apply to the case of awards.

(d) Fox v. Smith. 2 Will. 267, 9. vid. Addison v. Gray. S. P. 1d. 293.

(e) Freem. 410, 415.

If the defendant, instead of pleading the usual plea, "that the arbitrators made no award," plead some collateral matter, which if true, would be a bar to the action on the award, the plaintiff, without setting forth the award, or assigning a breach of it, may take issue on the plea, and go to trial on that fact; or if he doubt the effect of the plea, he may admit the truth of it by demurring, and put the whole of the cause on its validity. (a)

The statute of limitations (b) cannot be pleaded to an action of debt on an award under the hand and seal of the arbitrators; the words of the statute, as applicable to actions of debt, are "all actions of debt grounded on any lending or contract without specialty," and though perhaps, in strictness, an award, under the hand and seal of the arbitrator, may not, to all purposes, be considered as a specialty, that denomination, being, with propriety given only to an instrument under the hand and seal of the party who is to be bound by it, yet it may be so far considered as partaking of the nature of a specialty, as to be within the meaning of the statute; the purpose of that statute was to limit the time for bringing actions on a simple contract without writing under hand and seal, the prosecution of which a long time after the cause of them had accrued, was often the occasion of perjury in witnesses who took upon them to swear to circumstances of which from the length of time they must be supposed to have an imperfect remembrance: but this reason can never apply to a case which may be so easily ascertained as an award under the hand and seal of an arbitrator: the words of the statute are applicable to debt of another kind, and the decisions given on these words also favour this course of argument.—The statute says, it shall extend to all actions of debt for arrearages of rent; but on these words, it has been determined, that it was only an action of debt for arrearages of rent on a parol lease which could be barred by the length of time, and that they did not extend to rent reserved on a lease under hand and seal.—On these grounds the whole court, except Keeling, C. J. held that an action of debt on an award, though not a specialty, was not barred by the statute; the

(a) Yelv. 25. 79. Cro. Jac. 300.

(b) 21 Jac. c. 16. s. 3.

words not being, "all actions of debt without specialty generally," but, "all actions of debt without specialty, which are grounded on any lending or contract;" this action was clearly not grounded on lending; neither could it with propriety be said to be grounded on such contract as was intended by the statute; it was true indeed, all actions of debt were founded on contract either express, or implied by the law, and this was a contract implied, but had the statute meant to extend to such contracts, the words "founded on lending or contract" would have been superfluous and useless; and it clearly appeared what kind of contracts were meant, by coupling the word contract with lending; and if the more extensive construction of the act were adopted, it would extend to all actions of debt without specialty whatever. (*a*)

WHERE the defendant pleads the common plea of "no award," he cannot in general, after the replication, rejoin any thing else than that there was "no such award:" if the award be void, he must demur, because a void award, is as no award, and the bond is not forfeited by non-performance. (*b*) He must not rejoin that the award is void, because that is a departure from his plea. (*c*) Nor can he alledge payment or performance of the thing, in which the breach was assigned, for that will also be a departure. (*d*) So, if the award set forth in the replication order general releases to the time of the award, he cannot rejoin that a new cause of action arose, between the time of the submission and the award. (*e*) But if the award was made by an umpire, and the defendant had only pleaded that the arbitrators made no award, he may, on the umpirage being set forth, rejoin performance; for that does not contradict his plea. (*f*)

So, if the submission be general of all matters in controversy between the parties, with a proviso that the award be made of the

(*a*) *Hodsdon v. Harridge*. 2 Saund. 64. S. C. very inaccurately reported.
 2 Keb. 464, 497, 533, 536.
 (*b*) *Jenk.* 116.
 (*c*) 1 Keb. 414. pl. 12. 678. pl. 72. 2 Keb. 156.

(*d*) *Comyns Dig. Arbit.* I. 6. Pleader, F. 7.
 (*e*) 1 Keb. 434. contra. *Fretm.* 266.
 (*f*) *Hil.* 1791. B. R.

premises;

premises; the defendant may plead, that the arbitrators made no award of the premises, and if the award set forth in the replication do not comprehend all the subjects that were in controversy, he may rejoin that there were *other* things in controversy of which the arbitrators had notice, and of which they made no award, concluding "that therefore they made no award of the premises"—which is so far from a departure from his plea, that it is a confirmation of it. (a)

If the defendant conceive the award to be bad, instead of pleading "no award," and then demurring to the award set out in the replication, he may himself set forth the award, averring that the arbitrators made no other, without alledging performance.—Then the plaintiff demurs, and the question comes before the court on the validity of the award itself. (b)

If the defendant has performed the award, he may after setting it forth in his plea alledge performance. But it is said, that he cannot plead simply that he has performed, but must shew in what manner. (c) But it is conceived that this applies only to the case of an award in the alternative, where in order to discharge himself he must shew, which of the two things he has done. (d)—and he needs only shew performance, in words adapted to those of the award itself. Thus if an award be "that a suit which the defendant had against the plaintiff shall cease," it is sufficient to say that the plaintiff stood acquitted of that suit; it is not necessary to say that he gave him a release. (e)

WHERE the award is void, with respect to any thing awarded to be done by the defendant, he needs only aver performance of that for which it is good, and take no notice of that which he conceives to be bad. (f)

AN averment of tender and refusal, is sufficient, but the better

(a) Middleton v. Weeks. Cro. Jac. 200. vid. Farrer v. Gate. Palm. 511.

(b) Vid. Ridsen v. Inglet. Cro. El. 838.

(c) 28 H. 8. Mo. 3 pl. 9. Bamfield v. Bamfield. 2 Keb. 238.

(d) 26 H. 6. 27 H. 6. 1. Fhbt.

51. 2.

(e) Freeman v. Sheene. 1 Rol. Rep. 7, 8. Cro. Jac. 339. 2 Bulstr. 93. vid. 36 H. 6. 8. 39 H. 6. 11. b.

(f) 36 H. 6. 12. Brooke 27. 39 51. 19 E. 4. 1. 17 E. 4. 5. 18 E. 4. 23. Rol. Arb. F. 2. Al. 86. 3 Leon. 62.

opinion seems to be that it must be accompanied with an averment that he is still ready to perform. (a)

WHERE it appears by the award that the plaintiff is to do the first act, it is sufficient for the defendant to say that he has not yet done it, but that he is ready to perform his part as soon as the plaintiff does his. Thus, if the award be that the plaintiff shall prepare an obligation sealed with wax, and carry it to the defendant, who shall put his seal to it, in satisfaction to the plaintiff, it is sufficient for the defendant to say that the plaintiff has not yet tendered to him the obligation, and that he is ready to seal it, when it shall be offered. (b)

If the defendant set forth the award and alledge performance generally, and then on a breach being assigned in the replication, he rejoin and shew a special performance, this will be a departure. In an action on a submission bond, the defendant after oyer of the condition, set forth this award, 'that whereas the defendant had lent the plaintiff 30*l.* for securing of which the plaintiff had mortgaged certain lands to the defendant, and whereas there was a controversy between them concerning that matter, it was awarded that the plaintiff should pay to the defendant 35*l.* before a particular day, and that in the mean time he should permit the defendant to enjoy the possession of the mortgaged lands, and that on payment of the said 35*l.* the defendant should account to the plaintiff for the mesne profits, and deliver over to him the mortgaged deed, and reassign to him the mortgaged lands, and that they should give mutual releases;' then he alledged performance generally: the plaintiff replied that he had paid the 35*l.* before the day appointed, but that the defendant had not reassigned; the defendant rejoined that he had delivered the mortgage deed to the plaintiff and was ready to reassign, but that the plaintiff had not requested him: the plaintiff demurred, and it was resolved that this rejoinder was a departure from the plea, because there he had pleaded performance generally, and here he had only shewn a special performance. (c)

(a) 22 H. 6. 39. b. vid. Morgan's precedents, 525.

(b) M. 5 E. 4. 7. 2. Fbht. 52. 2

Brooke. Arb. 36. Rol. Arb. Z. 6.

(c) Rolfe v. Hodges. 1 Ld. Raym.

234.

It has several times happened that the defendant, by setting forth an award partially, has imposed considerable difficulty on the plaintiff how to answer him.—The first case of that kind which occurs is that of *Veal and Warner*—in which the defendant set forth an award that he should pay the plaintiff 3100*l.* and give him a general release, which was considered as an award of one side, and therefore void; and he averred that he had paid the money; the plaintiff took issue on the payment; the defendant, instead of joining issue, rejoined that the plaintiff was not at liberty to say he had not paid the money, because he had, by his certain writing, acknowledged the receipt of it. To this the plaintiff demurred, as he well might, because the rejoinder was a departure from the plea: the defendant joined in demurrer, and would have had judgment in his favour, because notwithstanding his allegation of performance it was of no consequence whether he had performed it or not, the award being only on one side, and therefore void. But on application from the plaintiff, leave was granted to discontinue, because it appeared that the award was also that the plaintiff should release all actions to the defendant which made it mutual; and the court reprehended the trick that had been put upon the plaintiff, adding to the rule for discontinuance, this reason, that it was for the foul practice of *Saunders* the defendant's counsel. (a) But *Saunders* excuses himself by the hardship of his client's case, saying that the bond was only in the penalty of 2000*l.* and the sum awarded was 3100*l.* when in fact the plaintiff was in the debt of the defendant, and the arbitrators had been in collusion with the plaintiff.—And further that a bill being afterwards filed in the Exchequer against the plaintiff procured the defendant relief.

THE defendant on oyer set forth an award that he should pay to the plaintiff 12*l.* 10*s.* and averred performance: the plaintiff replied that true it was the arbitrator had awarded that the defendant should pay to the plaintiff 12*l.* 10*s.* in full satisfaction of all differences between them, and offered issue on the non-performance. The defendant demurred, because the plaintiff had

(a) *Veal v Warner*. 2 Keb. 568. 1 Saund. 326.

concluded to the country, having alledged new matter without which the award was void, and the defendant was deprived of the opportunity of his traverse to that matter; and the plaintiff ought not to have his judgment, because it did not appear to the court whether the award was good or not: and of this opinion were Jones, C. J. and Charlton, J. after two arguments at the bar. But Windham and Levinz were of a contrary opinion, because the defendant had admitted the award to be good, and taken upon him to plead performance; and when the plaintiff had shewn that matter which proved the award to be good, the defendant should not be permitted to traverse that, to prove it bad, but if the truth was that the award was not in satisfaction of all matters, and so only on one side, he ought to have pleaded "no award;" but when he had pleaded it as a good award, and by the replication it appeared to be so, he should not be admitted a traverse to prove it bad, for that would be a departure from his plea, and equivalent to saying in the latter that there was an award made, and in his rejoinder that there was not. (a)

IN the case of *Strike and Bentley*, a question of the same kind occurred, but remained still undecided.—On oyer of the condition, it appeared to be, of a submission to perform the award of four arbitrators, with a proviso that it should be made, on or before the fifteenth of February, and if not, then to perform the umpirage of T. B. so that it were made, on or before the twenty-third of February.—The defendant pleaded that *before* the 15th, two of the arbitrators made no award, but that the umpire on the 23d awarded that the defendant should pay to the plaintiff 6l. and should afterwards release to him, and that he should permit the plaintiff to enjoy a particular close. The defendant averred that he had paid the 6l. that he was always ready to execute a release, and that he had not disturbed the plaintiff in the enjoyment of the said close.—The plaintiff in his replication confessed that the said two arbitrators did not make any award, and that the umpire had awarded as pleaded by the defendant, but averred that he had further awarded, that the plaintiff on payment

(a) *Seal v. Crowe.* 3 Lev. 165.

payment of the said 6l. should execute a release to the defendant; then he averred that the defendant had not paid the said 6l. but did not take issue on it, but traversed that the umpire had awarded *only* as the defendant had alledged.—On demurrer the case was argued several times; the principal objection made by the defendant's counsel was that no sufficient breach was alledged in the replication; for the defendant having shewn an award by the umpire that the defendant should pay to the plaintiff 6l. and the plaintiff having replied that the defendant had not paid it, he ought to have taken issue on it, and not to have concluded with a verification.—To this it was answered that though the replication might be faulty in not having taken issue on the payment, and also, because the plaintiff by the traverse in the replication had prevented the defendant from rejoining; yet the plea was faulty, because by the award, the defendant was to seal and execute to the plaintiff a general release; and he had only said that he was always ready to do it, whereas he ought to have expressly averred that he had done it; or that he had tendered a release which had been refused; that therefore no replication was necessary, and the first fault being in the plea, that in the replication was not material.—Treby, C. J. was of opinion, that in this case it was not necessary to shew any breach, because the bar was merely idle and impertinent, for it did not appear that the umpire had any authority to make an award, and then it was the same thing as if it had been said that the arbitrators had not made any award before the submission, or that a mere stranger had not made any award: the plea admitted that the arbitrators might have made it, for it was said that two of them had not made any award before the 15th of February, whereas by the submission, they had authority to do it on the same day.—The plaintiff might have demurred to the plea, and although he had replied, yet the defendant having demurred to the replication, the plaintiff might take advantage of the imperfection of the plea, the first fault being in that.—He admitted, however, that if the defendant had pleaded “no award,” a breach ought to have been sufficiently assigned.—Powell, J. was of a contrary opinion. He said, that though it was a general rule of pleading

that judgment should be given against him who committed the first fault, yet that could not have place in the case of an award. Had the defendant pleaded that he had not submitted, or any other collateral matter, it would not have been necessary for the plaintiff to assign a breach, but he might follow the defendant in his own way: but when the defendant pleaded "no award," or that which was equivalent, a breach ought properly to be assigned. And the plea here amounted to a plea of "no award."—The other judges delivered no opinion, but the plaintiff had leave to discontinue. (*a*)

IN such a case as this, if the plaintiff demand oyer of the award, and have it set forth at full length, assigning a breach in the same manner as if the defendant had pleaded "no award," he will be secure against any objection from the manner of pleading.—To an action of debt on a bond, after oyer of the condition, which was to perform an award, so that it were made on or before the 21st of May, otherwise to perform the umpirage of a third person to be nominated by the arbitrators, the defendant pleaded that no award was made by the arbitrators, but that they on the 20th of May nominated J. H. to be umpire, who on the 28th of May by writing awarded the defendant to pay the plaintiff 40l. on the 11th of June then next, which he had paid: the plaintiff craved oyer of the award, which recited that there had been considerable dealings between the plaintiff and the defendant, and that the plaintiff had paid the defendant all his demands, and that 40l. were due to the plaintiff; and therefore it ordered the payment of the said 40l. to the plaintiff.—The plaintiff then assigned a breach in the non-payment of the 40l.—The defendant demurred, and on many objections being taken to the award the plaintiff had judgment, no objection being taken to the manner of pleading. (*b*)

IF, on an award partially set forth and performance pleaded by the defendant, the plaintiff in his replication shew that the arbitrators awarded something more beside that which was set forth by the defendant, and shew a breach in non-performance

(*a*) *Strike v. Bensley.* Lutw. 525.

(*b*) *Elliot v. Cheval.* Lutw. 451.

ance of that, "without this that they awarded only as the defendant had set forth:" he will be secure against any objection to the form of his replication.—The defendant set forth an award, that he should cause all suits to cease which he had against the plaintiff, and averred that he had caused all suits to cease. The plaintiff replied that it was awarded besides, that the defendant should pay him 15*l.* which he had not paid, without this that the arbitrators had awarded only as the defendant alleged: it was objected on the part of the defendant, that this replication was not good, because it traversed that which was not alleged by the plea, and it was a rule that nothing should be traversed but what was expressly alleged. The plea had not alleged that the arbitrators had awarded only as was therein set forth. The court held that the replication would have been good without the traverse, and it was good with it; for when the defendant pleads that it was awarded that all suits should cease, this must be understood to be the whole of the award, and when the plaintiff replied that they had awarded more, he might well take a traverse. (a)

In such a case, the defendant cannot rejoin, alleging that the additional part of the award set forth by the plaintiff was accompanied by another circumstance which rendered it void for that part.—In the case immediately preceding, he had rejoined that the arbitrators had awarded that he should pay the 15*l.* at the house of J. D. a stranger, and that for this the plaintiff was to release all actions to the day of the release. He did this, on the supposition that the award of payment at the house of J. D. was void, as exposing him to an action of trespass, and that therefore he was not bound to perform it. The plaintiff demurred, and insisted that this was a departure from the plea; for when the defendant had pleaded an award in bar, it must be understood to be the whole award, and he had contradicted that intendment by afterwards setting forth another part—and of this opinion was the court.

If, in truth, from the default of the defendant, no award has

(a) *Linsley v. Ashton.* Godb. 255. 1 Rol. Rep. 6.

been made within the time limited, the plaintiff may, to the plea of "no award," reply that default of the defendant.

He may reply that the defendant revoked the authority of the arbitrators, and it is not necessary to state that the arbitrators had notice of the revocation, for such notice is implied in the very word revoked; but he must shew that the countermand was before the day appointed for making and publishing the award, for otherwise there is no forfeiture of the bond. (a)

IN debt on a bond conditioned to pay such costs as should be stated by two arbitrators chosen by the parties: the defendant pleaded that none were stated, which was in effect that no award was made.—The plaintiff replied that the defendant had not brought in his bill: on demurrer, the court inclined to think that before any default could be assigned in the defendant, the plaintiff ought to have shewn the appointment of an arbitrator by himself. (b)

WHERE the submission is by bond, the condition containing a proviso that the award shall be made within a limited time; if that time elapse without any award being made, and the parties, by mutual consent, enlarge the time; though the award be made within this enlarged time, the party in whose favour it is made cannot maintain an action on the bond to recover the penalty for non-performance: the defendant has bound himself in a penalty, to abide by an award, if made within a given time; but that cannot extend the penalty to an award made after that time under a new agreement. (c)

AFTER the practice began of referring matters to arbitration under a rule of *nisi prius*, application was of course made in the name of the party in whose favour the award was made, to enforce performance by an attachment as for a contempt in disobeying an order of the court.—The courts of law, however, for a considerable time listened with much reluctance to such applications. They said it was then a matter of the first impression; that no attachment lay for non-performance of an

(a) 8 Co. 81.

(b) Baldway v. Ouston. 1 Vent.
71. 2 Keb. 624.

(c) Brown v. Goodman, 3 Term,
Rep. 592. n.

award, under these references ; that it was a novel practice, thus to imprison the body of a man, without his being heard ; that the defendant might deny that any award was made ; that they would not try such issue upon affidavits ; that if such applications were encouraged, all awards might be affirmed as good, how void soever they might be—but that the successful party might have his action on the award, and then the validity of it might be discussed. (a)

AND at first, a distinction was made between the case, where the party, after having, by rule of *nisi prius*, consented to submit, afterwards withdrew his submission before any award was made, and the case where, continuing his submission, he afterwards refused to perform the award. In the former case the attachment was generally granted ; in the latter it was refused, because in the former there was no other remedy ; in the latter the opposite party might have his remedy on the award. (b)

SOMETIMES the objection was only to the manner in which the application for an attachment was made ; it having been declared that an attachment should not be granted on a general suggestion of a breach of the award without notice to the party against whom it was moved ; but that he who would have an attachment must suggest a breach by "affidavit," and then the defendant might come in and shew cause why an attachment should not issue, and so the matter might come in debate. (c)

WHILE the courts of law, however, were so unwilling to enforce obedience to an award by process of contempt ; the courts of equity made no difficulty in doing it, where the submission was under one of their rules. (d)

AFTERWARDS the courts of law ran into the contrary extreme, and in all cases granted an attachment, whether the award was void or not in point of law, observing that the reference being by rule of court by consent of counsel in the cause, there ought to be a rule for performance, for the abuse to the court ;

(a) 1 Keb. 130, 138, 559. 1 Sid. 452, 3130. Sir T. Raym. 35, 152.
2 Keb. 22, 645.

(b) 2 Keb. 22. 3 Keb. 844.

(c) 1 Keb. 634.

(d) Hide v. Pettit. 22 Car. 2. 1
Ca. Ch.

that if no attachment were to go, the party in whose favour the award was made, would be deluded by the trial being put off, and there ought either to be no submission, or that ought not to be elusory. (a)

BUT now the course of proceeding to obtain an attachment is this; the award must be tendered to the party against whom it is intended to move for the attachment, and if he refuse to accept it, affidavit of the due execution of the award, and of such tender and refusal, must be made, and on that an application made to the court to have the order of *nisi prius* made a rule of court; then a copy of this rule must be served on the party refusing to accept the award; if he still refuse to accept it, an affidavit must be made of personal service of the rule, and of the disobedience to it; and then on application, grounded on that affidavit, an attachment will be ordered of course. (b)

WHEN the award is accepted, but the money being demanded is not paid, an affidavit must be made of the due execution of the award, and of the demand and refusal of the money. And an indorsement on an award unstamped, is a sufficient authority to a third person to demand the money awarded; it is not necessary that there should be a warrant of attorney for that purpose. (c)

On references at *nisi prius*, it is not unusual for the plaintiff to take a verdict by consent, for security. And if the award be made in his favour, he may, at his election, either enter up judgment on the verdict, and take out execution for the sum awarded, if that does not exceed the sum for which the verdict was taken; or he may proceed by attachment. But, he cannot enter up judgment without leave of the court; (d) and to obtain that, it is as necessary to produce an affidavit of the due execution of the award, and the demand of the money awarded, as it is, to obtain an attachment. (e)

WHERE the submission is by bond with consent to have the "award" made a rule of court, it is said, that the court will not

(a) 3 Keb. 164, 446. Comb. 303.

(b) 1 Crompton's Practice, 264.

(c) 2 Bl. Rep. 990, 991.

(d) 1 Salk. 84.

(e) Barnes, 58.

grant its interposition; and it is certain, that the words of the statute do not extend to that case; they provide only for the case of a consent to have the "submission" made a rule of court. (a) But where the submission has been made a rule of court, it is not necessary there should be another application to have the award made a rule of court, in order to ground an attachment: that will be granted without such application. (b)

THE party in whose favour an award is made, when the submission is according to the statute, may have his remedy by attachment, though he may have obtained judgment in an action on the bond, or on the award; for he may perhaps think an attachment a more expeditious and effectual process than suing out execution on the judgment. (c)

AND though the defendant may be in custody on an attachment, the court will not stay proceedings in an action of debt on the bond, or on the award, because if the defendant die in execution on the attachment, that execution is at an end, and cannot be revived against his heirs or executors; for the statute says, that the attachment shall be prosecuted as in the case of a contempt in other cases: and a contempt dies with the person, and cannot be prosecuted against his representatives; (d) but if he die in execution on a judgment, the plaintiff may still have an execution on his goods. (e) But, if the defendant be taken in execution on the judgment, the attachment will be discharged. (f) And if an action be brought before an application is made for an attachment, it will be refused, during the pendency of the action, unless some very particular reason appear to the court for granting it.—This case was compared to the case of the several remedies which are allowed on a mortgage, a bill for foreclosure, an action on the bond, and an ejectment to obtain the possession, which are allowed to be all used at once. But Lord Hardwicke answered, that these several remedies were for different purposes,

(a) Vid. *Harrison v. Grundy*. 2 Str. 1178. *Anon.* 2 Barnard. B. R. 163. | *Webster v. Bishop*. Prec. in Ch. 223. 2 Vern. 444.

(b) Salk. 71.

(c) 1 Salk 73. 10 Mod. 333.

(d) Determined by the Judges in | *Paterfon v. Gros*. 2 Barnard. B. R. 227.

(f) Vid. *Richardson v. Chancey*.

1 Barnard. 386. cited B. R. H. 107.

and remedies to which the party is intitled by the course of law, without the leave of the court; but the two remedies in the present case had but one object, that of enforcing obedience to the award, and the one was by the course of law, while the other depended on the discretion of the court. (a)

If the time limited for making the award expire without any award made, there must be a second application for making the submission to a second arbitrator a rule of court, or else the court cannot grant an attachment for non-performance of the second arbitrator's award. (b) And the submission must be made by the parties on the record: therefore, an attachment was refused, where it appeared that a submission to an award between A. and B. had been made a rule of court; but no award having been made within the time, the dispute had been referred to a second arbitrator, by B. and C. who were the real parties, without an application to make this submission a rule of court.—And the court would not go into the merits, though the defendant offered to waive the objection, because they had no jurisdiction. (c)

WHEN the submission is made a rule of court according to the statute, the affidavits, to ground an attachment, need not be intitled in any cause, for till the rule for the attachment is granted, there is no proceeding in court.—But the affidavits in answer must be intitled. (d)

IN both forms of submission, it is discretionary in the court, to enforce the award by attachment or not.—The plaintiff had brought an action against the defendant for diverting a water-course; the matter was referred to arbitrators, who awarded that the defendant should fill up a canal, restore the stream to its former course, and do several other matters relating to the water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the award, and read several affidavits to found his application. The defendant in answer read several affidavits to prove his compliance with the directions of

(a) Stock and Huggins v. De Smith. B. R. H. 106.

(b) Owen v. Hurd. 2 Term Rep. 643, 4.

(c) Owen v. Hurd. 2 Term Rep. 643.

(d) Bevan v. Bevan. 3 Term Rep. 601.

the award. The court therefore refused an attachment, on account of the contrariety of evidence, and left the plaintiff to his remedy by action. (*a*)

THEY may also refuse to enforce an award by attachment, when it appears to be a hard case upon the defendant, though they cannot for that reason set the award aside. (*b*)

AN attachment for non-performance of an award is only in the nature of a civil execution, and therefore a party cannot be arrested on it, on a Sunday. (*c*)

WHEN the award is for the payment of money, the only remedies to enforce performance are those which have hitherto been considered. (*d*)—But when it is for the performance of any collateral act, it may sometimes be enforced by a bill in equity, which will decree a specific performance.

WHEN the award is made in consequence of a reference by order of a court of equity, it seems to be a reasonable conclusion, from the tenor of all the cases on that subject, that a bill will generally lie for a specific performance: but when the submission is merely voluntary, without the interposition of a court of equity, such a bill will not lie, unless there has been some acquiescence in the award by the parties to the submission, or an agreement afterwards to have it executed. (*e*)

BUT if, in the case of such a submission, the plaintiff, who seeks by his bill to enforce the performance on the part of the defendant, has himself performed his part, a court of equity will decree a performance by the defendant, (*f*) even where the defendant shews that the plaintiff has put the submission bond in suit in a court of law; unless the award order something which it is against the constant course of a court of equity to enforce. Thus, where, among other things, it was charged by the bill that the father of the plaintiff and defendant, was seised to him and his heirs male,

(*a*) Sir Thomas Hales v. Taylor. 1 Str. 695.

(*b*) Vid. B. R. H. 106, and 1 Bur. 278.

(*c*) 1 Term Rep. 266. denies 1 Atk. 58. to be law.

(*d*) 3 P. Wm. 189, 190.

(*e*) Dict. per Lord Hardwicke, 1 Atk. 74. (62) Bishop v. Webster. Abr. Eq. Ca. 51. Vid. 3 Rep. in Ch. 18. fo. ed. Semb. contra Id. 16.

(*f*) Poole v. Pipe. 18 Car. 2. pr. Hyde Chancellor. 3 Rep. in Chan. 20.

with the fee expectant of several lands in Henfield, and the plaintiff conceiving he had been seised in fee of the lands in Henfield, conveyed the same to the defendant and the heirs male of his body, leaving the fee in himself; that differences arising about the estate tail, Mr. Justice Croke, who had been chosen arbitrator between the plaintiff and the defendant, had awarded that the defendant should enjoy a former estate tail settled by their father, on him and his heirs male, and that the plaintiff should confirm the said estate tail at the charge of the defendant, and that the defendant should do no act to bar or discontinue the said estate tail, or the remainder of the plaintiff, without the consent of the latter, except it were for a jointure for his wife.—The Lord Chancellor, though he held that the defendant should answer as to the other parts of the award, declared that as it was absolutely against the constant course of the court to decree a perpetuity or give any relief in that case, he would allow the defendants demurrer as to this part of the bill. (a)

ON a submission by bond, it was awarded that the plaintiff, in the bill, should pay the defendant 900*l.* and seal a release to the defendant; that the defendant should assign several securities which he had from the plaintiff. The bill stated that the plaintiff had sold some lands to raise the 900*l.* expecting the defendant would accept it, as he had intimated he would, and tendered him the 900*l.* and a release executed according to the award: though there was no other execution on the part of the plaintiff, and though it was conceived, that the award was *extrajudicial, and not good in strictness of law*, yet the Lord Chancellor decreed that it should be specifically performed. (b)

ON a bill brought to compel the defendant to make specific performance of an award, the case appeared to be thus: the plaintiff and defendant, who were brother and sister, had a dispute about the fee simple of a small parcel of land under the father's will; they entered into a bond in the penalty of 200*l.* to stand to the award of arbitrators with respect to the dispute. The arbitrators awarded that the plaintiff should pay 10*l.* to the de-

(a) Bishop v. Bishop. 1 Rep. in Chanc.

(b) Norton v. Mansell, 2 Vern. 24. S. C. 2 Rep. in Chan. 304.

defendant on a particular day, and 30*l.* on a future day ; and that on this the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and her heirs. The plaintiff paid the defendant the 10*l.* on the day on which it was awarded to be paid ; she afterwards tendered the remaining 30*l.* on the day on which that was awarded to be paid, and the defendant was willing to take the money, but would not execute the fine and deed of uses. On the opening of the case, the Master of the Rolls said he thought this a strange bill, for which he knew no precedent ; and that the plaintiff must sue her bond. The plaintiff's counsel urged that the defendant, having accepted the 10*l.* had thereby undertaken to perform the award, and cited the case immediately preceding, where he said the court had decreed a specific performance though the award had not been executed, and though, in strictness of law, it was void. The Master of the Rolls replied, that, in that case, the award not being good in law, there might be reason to decree a specific performance of it. But he desired to know what the defendant's counsel could say as to the defendant's having accepted part of the money. It was contended that it was sufficient, that, unless in very extraordinary circumstances, there was no instance of a bill being brought for a specific performance of an award : that besides, this was an unreasonable award, that the husband should procure his wife to join with him in a fine, which it might not be in his power to do ; and therefore the court ought not to oblige him to it. His honour answered that there were a hundred precedents, where, if the husband, for a valuable consideration, covenant that his wife shall join with him in a fine, the court had decreed that the husband should do it. In the present case the defendant, by his acceptance of part of the money awarded, had undertaken specifically to perform the award. His honour therefore decreed, that on payment of the residue of the money awarded, the defendant should perform the award, and that he should pay costs ; it being contrary to good conscience to take the money awarded, and yet refuse to perform his part of the award. (a)

THOUGH

(a) Hall v. Hardy. 3 P. Wm. 187.

THOUGH an award made in consequence of a voluntary reference be defective in form, or might have been at first avoided for uncertainty, yet if the parties have long acquiesced in it, and performed it, a court of equity will prevent its being afterwards disturbed by a suit at law.

IN a bill filed in Chancery by one Scot against one Wray, it appeared that some differences having formerly arisen between one Roger Whittey, and the defendant Wray, respecting certain lands, the decision was referred to arbitrators, who awarded that Whittey should have the lands; and there was a proviso in the award, that if any doubts should arise upon it, the arbitrators should expound them: the defendant Wray had found a defect in the award, which was, that it ordered Whittey to have the lands without saying that he and his heirs should have them, for which reason he insisted that Whittey should have them but for life; on which three of the four arbitrators then surviving, by a writing under their hands and seals, declared they meant that Whittey should have the lands to him and his heirs for ever, and that the latter words were left out by mistake: it appeared further, that Whittey, being in possession, had conveyed the lands to Scot, the present plaintiff, and his heirs; and that the defendant, claiming under an old deed of entail, sought to eject the plaintiff out of the premises.

THE Chancellor, on perusal of the award, and of the explanation of it, and also of the depositions of the two arbitrators who were alone surviving of the four, and which depositions corresponded with the former explanation, considering that the award had been long since made and executed on both sides, and adopting the opinion of two judges whom he had called to his assistance, declared, that notwithstanding it had been made on a voluntary reference, without the direction of the court, it ought in justice and equity to be ratified and confirmed, and he accordingly decreed that Scot and his heirs should enjoy the land against the defendant, and all claiming under him, according to the award and explanation. (a)

ON the same principle the court refused to reverse a decree on
a bill

(a) Scot v. Wray. 1 Rep. in Chan. 46.

a bill of review which had been made sixteen years, in consequence of a reference to settle the differences between the parties; though the plaintiff, in the bill of review, assigned for error, that the cause had been referred to four commissioners, and only three certified, and that the lease on which he now insisted was not then in issue, and that he had never assented to the certificate. (a)

IF the plaintiff in the bill was limited to a time for the performance of his part, and does not perform it within that time, the defendant shall not be bound by the award; yet if, subsequently to the time, he has accepted of part performance, he shall be bound for so much as that is an equivalent for.

IN a bill filed by Susan Ewes and William Reeve against Edward and William Blackwall, the circumstances of the case appeared to be these.

THE plaintiff Reeve being seised of a certain manor and lands, in part freehold and part copyhold, mortgaged them to the defendants, on condition to have them reconveyed to the plaintiff Reeve and his heirs, on payment of some money due to them: some differences afterwards arose between the parties about the amount of those sums, and suits being commenced by the plaintiffs for a new redemption, a reference was proposed, and accordingly, by agreement, all matters were referred to two persons, who made an award that Reeve should pay to Edward Blackwall, as due to him, the sum of 6543l. 13s. 9d. and to William Blackwall 3500l. as due to him: but that if Reeve should procure bonds or bills under hand and seal, by which the said Edward Blackwall stood bound to any person or persons for his own just debts, which with interest should amount to the debts aforesaid, and the said bonds and bills should be delivered up to the said Edward within five weeks from the date of the award, then the defendants should accept them in full discharge of their debts, and then reconvey to Reeve, his heirs and assigns, all the lands which were by him mortgaged to them, discharged of all incumbrances incurred by them, or any claiming under them, with all deeds and evidences concerning the same, and discharge

(a) *Id.* Goddard v. Goddard. 15 Car.

charge all bonds and securities whatever, which they had against Reeve or his estate; but if Reeve should fail in the performance of what was awarded, then the defendants should have the full benefit of their securities for the whole money stated to be due to them as before mentioned.

THE bill further stated, that within the time limited for payment of the said money, there was a great quantity of grass fit to be cut off the estate, which it was agreed the defendant Edward should cause to be cut and made into hay, and that if the plaintiff Reeve performed the award, and paid the money and charges for cutting the grass, and making it into hay, then he should have it to his own use: that in part performance of this award, the plaintiff Reeve borrowed of the other plaintiff Susan Ewes, the sum of 700*l.* and paid the same to the defendant Edward Blackwall, by the hands of Henry Johnson, Esq. but not within the five weeks from the date of the award; and farther paid to him, by the same hand, the sum of 6543*l.* by delivering up several bonds, in which Edward stood bound to several persons for his own debts; and that in consequence of this the said Edward and the plaintiff Reeve conveyed the lands in the bill mentioned, or the greatest part of them, to Henry Johnson and his heirs.

THAT, in further pursuance of the award, the plaintiff Reeve paid the defendants, or one of them, in money or in bonds, or statutes, in which the said Edward and John Blackwall, or one of them, were bound, the sum of 2058*l.* 1*s.* 6*d.* part of the said 3500*l.* appointed to be paid by the award to the said Edward Blackwall, for the debt of the other defendant William Blackwall, which they had accepted, and the plaintiff had tendered and offered to deliver up some other bonds and securities, in which the said Edward stood bound for his own debts, and which amounted to the residue of the said sum of 3500*l.* and required the defendant to accept the same, and that the said William Blackwall should surrender the copyhold lands to the plaintiff Susan Ewes and her heirs, and convey the freehold lands to the plaintiff Reeve and his heirs, discharged of all incumbrances, and perform the award specifically, and account for the value of the hay.

ON hearing, the court dismissed the bill as to the hay, and decreed that the money paid and "accepted" by bonds or otherwise, was well paid, and should go towards the satisfaction of the debt due to William Blackwall, as well on bond as on mortgage, so far as the same would reach; and that the award, in the bill set forth, not being performed by the plaintiff within the time, ought not to be conclusive and binding to the said William Blackwall, to cut off any part of his just debt, and that therefore the award should stand dissolved from that time. That the master should compute what was due to William Blackwall for principal and interest by bond or mortgage, beyond what had been already paid by bonds or in money, and that on payment of that balance, at a time to be appointed by the master, the defendant should reconvey and surrender the mortgaged premises to the plaintiff, or to his appointment, discharged of all incumbrances, as the master should direct, and then deliver up the mortgages and bonds, and other writings, and in default of payment the defendants should take the benefit of their securities. (a)

HOWEVER far a court of equity may assist a plaintiff to procure the execution of an award, it will not compel a defendant to discover a breach, by which he may charge himself with the penalty of a submission bond. (b)

(a) Susan Ewes and Wm. Reeve v. Ed. and Wm. Blackwall. Rep. temp. Finch, 22.		(b) Bishop v. Bishop. 15 Car. 1 Rep. in Ch.
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C H A P. VII.

THE MEANS OF PROCURING RELIEF AGAINST AN
AWARD WHEN IMPROPERLY MADE.

WHERE the objection taken to the award is, that it is contrary to some of those rules, which the law has prescribed to be observed in the constitution of an award, that objection may be taken when the award is put in suit. This is equally applicable to the case of a submission by the mere act of the parties, and to that where the mere act of the parties is accompanied by the interposition of a court.

BUT when the submission is of the former kind, then in order to be relieved against the award on account of any extrinsic circumstances, the defendant cannot make these a defence to the action on the award or on the submission bond: he cannot give in evidence any thing to impeach the conduct of the arbitrators; the award is a determination of judges chosen by the act of the party himself, and nothing extrinsic to that judgment can be offered in evidence to overturn it; if such evidence were admitted, the plaintiff would come entirely unprepared: to support his action he has only to prove the submission and the award; the corruption or partiality of the arbitrators, it is said, may be wholly unknown to him; it concerns only the arbitrators themselves: there is no precedent at law of any *writ* to set aside an award; corruption or partiality has never been pleaded, and the statute of William the third shews that an award at law must stand, where there is no objection to the terms of it; for, as to awards made under that statute, it says they must stand, unless controverted and set aside in two terms. (a)

IN this respect the Roman law is somewhat different from ours; for though it provides no direct method, by which the

(a) Vid. 1 Saund. 327. 2 Vesey, 315. Wills v. Maccarmick, C. B. 2 Willf. 149.

party against whom the award is made can impeach the conduct of the arbitrators, yet by a rescript of Antoninus, it is provided that the enmity of the arbitrators to the defendant may be set up as a defence against the plaintiff's action for the penalty expressed in the submission. (a)

WITH us, in such a case, the only relief is in equity, which often sets aside awards, and gives that kind of relief, which seems naturally to arise out of the circumstances; as by directing accounts, or granting injunctions to stay all legal proceedings which had been pursued, on the foundation of the award being good. Though bills of this sort are received with some prejudice, because arbitrators are judges of the party's own nomination, yet, if on partiality a court of equity should not relieve, arbitrators would have too great a power, and might abuse it from corrupt motives. (b)

BUT, except for corruption or improper conduct in the arbitrators, a court of equity will never set aside an award, where the submission is voluntary. (c)

IN a bill filed to have an award set aside, it was alledged by the plaintiff, that he had been arrested at the suit of the defendant, on which both parties submitted to two arbitrators, and on the event of their not agreeing, then to an umpire; on the non-agreement of the arbitrators, the umpire awarded 36l. to be paid by the plaintiff in the bill to the defendant, and as was suggested in the bill, without hearing the plaintiff. The defendant, in his answer, set forth that he held lands by lease of the plaintiff; that being indebted to several persons, he was persuaded by the plaintiff, his landlord, to make over his goods to him, and de-

(a) Cum quidam arbiter ex aliis causis inimicus manifeste apparuisset, testationibus etiam conventus, *ne sententiam diceret*, nihilominus nullo cogente dicere perseverasset: libello cujusdam id querentis, Imperator Antoninus subscripsit, *posse eum uti doli mali exceptione*. Et idem cum a judice consuleretur apud quem pena petebatur, rescripsit, *etiamsi appellari non*

poteß, doli mali exceptionem in pæna petitione obstatutam. Per hanc ergo exceptionem quædam appellandi species est, cum liceat retractare de sententiâ arbitri.—Ff. l. 4. t. 8. f. 32. n. 14.

(b) 2 Vesey, 315. 2 Wils. 149.

(c) 1 Ca. Ch. 276. 3 Atk. 529. (496.)

liver him up the lease, in order to protect it against his creditors; but the plaintiff abusing his trust, had insisted the goods were his own by an absolute surrender; that this being the greatest subject of difference between them, it was referred to arbitration, and all this matter appearing before the arbitrators in the presence of the umpire, the latter had made the award. It appeared on the proofs in the cause that the plaintiff had goods of the defendant only to the amount of 7l. 10s. but that he might have been heard, if he had pleased. The court thought the award ought not to be set aside for any supposed hardship in the case, as the umpire had exercised his judgment in the recompence he had given to the defendant for the injury he had sustained, and the bill was dismissed with costs. (a)

THE same rule applies to the case of an award made in consequence of a reference at *nisi prius*, for to a court of equity, that is nothing more than a voluntary reference. Thus, where the plaintiff tenant for life, remainder in tail to his first, &c. sons, remainder to the defendant in tail, had committed waste for which the defendant had brought his action, and at *nisi prius*, by consent of the parties, the matter was referred to two of the jury, under a proviso that they should make their award by Michaelmas, otherwise that an umpire should decide: no award was made by the arbitrators, but the umpire gave the plaintiff in the action, the defendant in the bill 384l. damages. The bill was exhibited to pray relief; 1. Against these damages, as excessive; 2. For misconduct in the umpire, because he had declared before the umpirage made, that he would not meddle in the matter, and afterwards that he had made it for fear he should be arrested, from whence the plaintiff's counsel inferred that he had been menaced; and lastly, because after the submission the plaintiff had repaired the premises, and proved repairs done, and that 40s. would complete them.

THE defendant insisted that the umpirage ought not to be set aside without fraud or partiality proved; that the time when the

(a) Waller v. King. 2 pt. Ca. | hill v. Church. 3 Rep. in Ch. 49, to
in Law and Eq. 63, 64. Vid. Geen- | the same point.

umpire had said he would not meddle in the business, was in August, before the time he was to make his umpirage, as the truth really was; and that the plaintiff had notice given him by the umpire to attend, which he did not, so that the umpire had no notice of the repairs, and if he had, that was not material to avoid the award. (a) In another report of the same case, (b) it appears, that the tenant for life had no issue; that the value of the estate was 70l. per annum, and that the tenant for life, who had suffered some mills and houses, of which the estate consisted, to go greatly out of repair, had, before the umpirage made, repaired all the waste to within 40s. and forbidden the arbitrators to make any award, and had also forbidden the umpire, who notwithstanding made the umpirage as before stated: one ground of impeaching the umpirage was that the umpire had refused to hear the plaintiff; but of that no other proof was given than that he had said, the plaintiff might bring what witnesses he would, he would not believe them, because he knew the premises himself, and was well satisfied about the value of the repairs. With respect to the outrageousness of the damages, it was said, that the defendant had but a remote remainder after an estate tail, and yet he had as much given him, as if he had been to come immediately to the estate: it was answered, that the damages were not to be measured by the quantity of the tenant's estate, but by the injury done to the inheritance; that were it necessary to consider the excessiveness of the damages, they might have been given for the treble value; and that no fraud or collusion being proved, the court could not set the award aside, unless there were a manifest error in the body of the award.

IN bills to have an award set aside for corruption or partiality, it is usual to make the arbitrators defendants; (c) the arbitrators may plead the award in bar, but they must support their plea, by shewing themselves impartial, or the court will give a party a remedy, by making them pay costs. (d)

(a) Brown v. Brown. 1 Ca. Ch.

140.

(b) 1 Vern. 157.

(c) Ca. Temp. Finch, 141.

(d) 2 Atk. 396, (412.)

BUT in order to avoid the inconvenience of having a bill filed against them, it is not unusual for the arbitrators to insist on its being made a condition of their acceptance of the office, that no bill in equity shall be brought against them: in which case, if they are made parties to a bill for setting aside the award, they may apply to have their names struck out, which will be immediately ordered. (a)

A BILL will not lie to compel the arbitrator to discover the grounds on which he made his award; it is unreasonable that he should be put to so much trouble and expence: if there be any palpable mistake made by the arbitrator, or a miscalculation in an account that had been laid before him, the party aggrieved may bring his bill against the party, in whose favour the award is made, to have it rectified. (b)

WHERE the submission is by rule of a court of law, whether in consequence of a reference at *nisi prius*, or according to the statute of William, a court of equity will not entertain a bill to set aside an award for corruption and partiality, unless the court of law has refused that relief, or in the case of the submission according to the statute, the time for complaining in the court of which the submission has been made a rule, is elapsed. (c)

WHERE application has been made in the court of which the submission is a rule, for an attachment for non-performance, by one party, and to have the award set aside, by the other; and both applications have been unsuccessful, then a bill will lie to obtain relief against the corruption or partiality of the arbitrators.

THE case of Mr. Ward of Hackney is a very remarkable instance of this kind. It came twice before the court of Chancery; it was a bill to set aside an award made by Walker and Floyd, two arbitrators out of three, in consequence of a reference to put an end to a cause of long standing, in which an account was before a master, the submission was made a rule of the court of King's Bench. The party against whom it was made obtained a rule to shew cause, why the award should not

(a) Id. 396, 397, (412, 413.)

(b) 3 Atk. 614. (609.)

(c) 2 Atk. 155, (162.) Vid. Bunb. 265. 1 Barnard. 152.

be set aside, on account of partiality and misbehaviour in the arbitrators. On shewing cause, the court was divided, so that the award could not be set aside. The other party afterwards moved for an attachment for not performing the award, the court was still equally divided, and no attachment was, of course, granted. The party in whose favour the award was made, having no advantage from the submission being made a rule of court, brought a common action on the submission-bond. Ward, the party against whom the award was made and the defendant in the action, filed his bill in Chancery merely to be relieved against the award, only praying general relief. The defendant to the bill, by his answer, insisted that the King's Bench had determined, and therefore the award ought not to be set aside. The cause was heard by Lord Macclesfield, (a) who was a little doubtful on account of the proceedings in the King's Bench, as the award was by virtue of a submission by rule of that court, within the act of Parliament; he therefore hesitated whether he should give relief, as the whole matter was subject to the jurisdiction of a court of common law, who had inquired into it, and were not of opinion to set it aside: all he did at first, therefore, was to refer it to the master to state what the King's Bench had done; and the master stated the case as above.—Lord Macclesfield was then of opinion that the King's Bench had not determined either way, not having thought fit to set aside or to confirm the award, because they had refused the only process to carry it into execution; and therefore he held, with reason according to the opinion of Lord Hardwicke, that the case should be considered as an award by submission, without a rule of court, and that if a court of common law, which had this summary jurisdiction, refused to exercise it, and left the party on one side to his action, it left the other to seek relief by a bill in equity. (b)

How far a court of equity will interpose to grant relief against partiality or corruption in the case of an award made in pursuance of the statute, either when no application to set the award

(a) 21st April, 1719.

(b) Ward v. Periam, cited 2 Atk. 355, (162,) 396, (412.) 2 Vesp. 326, 327.

aside on that account has been made to the court of which the submission has been made a rule, within the time limited by the statute, or when such application has been made without success, but no application has been made on the other side for an attachment, appears by no means to be a settled point.

THE words of the statute so far as they affect this question are these: "in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any court, either of law or equity, unless it shall be made appear on oath to *such* court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage, was procured by corruption or other undue means. And any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of no effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties; any thing in this act contained, to the contrary notwithstanding."

I FIND but one case reported relative to this question, and that is by no means conclusive or satisfactory. It is reported in two books, with a little variation: in the one, (a) it appears that an application had been made without success in the court of King's Bench, to have the award set aside, before the filing of the bill; in the other, (b) it is said that no application had been made to that court.

THE bill was filed to have satisfaction on a note of hand for 3184l. given to one Richardson by Cambel, one of the defendants to the bill, and party to the submission, which had come to the hands of the plaintiffs by mesne assignments, and to set aside

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(a) 1 Barnard. K. B. 75, 152. (b) Bunb. 265.

an award which ordered that note to be delivered up by the plaintiffs: the bill charged that the note had never been produced to the umpire; that one of the plaintiffs informed the umpire that Alardice, the other plaintiff, was gone to Scotland, to inquire whether the defendant Cambel had paid this note to several shipowners there, as he pretended; that Alardice was the only person who knew any thing of the affair, and therefore the other plaintiff desired the umpire to wait for his return, which he promised to do, but afterwards made the umpirage *before* Alardice's return; that both the umpire and Cambel promised the award should be only conditional, and that Alardice should be heard after his return from Scotland: and there were other charges in the bill of undue practice in making the award.—One report (*a*) states, that the defendants pleaded the submission to the award, the election of the umpire, and the award within the time; that the submission had been made a rule of the court of King's Bench; that there had been no application made to that court according to the statute, and therefore that all other courts were now precluded from taking cognizance of the cause; the other report (*b*) states, that Cambel pleaded that the umpire made an absolute and impartial award, according to the best of Cambel's belief, but that it had been delivered above two terms before the filing of the bill, so that the plaintiffs were now too late to take his exceptions; that the umpire put in an answer to the bill in a particular manner, and set it forth with a great many circumstances.—By both reports it appears that the defendants gave no answers to the express charges in the bill, verifying their plea only in general terms, and denying combination.

THE principal question being, whether courts of equity, as well as the court of law, of which the submission had been made a rule, were not confined by the statute to the time thereby prescribed, for the allowance of exceptions to the award; the Chief Baron is reported to have been of opinion that they were not. He observed that before this statute, agreements made in any cause depending in courts of law, and afterwards made rules of those courts, had equally the advantage of that speedy remedy, which

(*a*) Bunb.

(*b*) Barnard.

which now all extrajudicial agreements may have on this act of Parliament. They were, however, open to the inspection of courts of equity, who might examine into any circumstances of fraud or misbehaviour: as the law then stood, if courts of law had enforced such agreements by attachments, for proper reasons courts of equity might have granted injunctions. This statute had indeed confined the courts of equity in cases of submissions under the provisions of it; it said in general that no injunction should lie upon such attachment: but a bill to discover whether there was partiality or not, he said, was left as it was before, and would not affect the proceedings on the attachment. On the whole, he thought the plea ought to be overruled; but that if the rest of the Barons thought it as well that the plea should stand for an answer, he would not oppose it. Hale and Comyns agreed with the Chief Baron as to the principal point; Carter differed from them: but they all agreed that the plea should stand for an answer, with liberty to except. (a)

WHEN the practice of referring causes at *nisi prius* was but new, and the courts had just overcome their reluctance to enforce, by attachment, awards made in consequence of such references; it was a matter of some difficulty, to procure relief against the corruption or misconduct of the arbitrators. Holt is reported to have maintained, with even indecent warmth, that an award should not be impeached for any such misconduct, and for no better reason than that it was contrary to all practice within his experience; which was that the integrity of the arbitrators, whom the parties, by consent, had chosen to be their judges, should never be arraigned any more than the integrity of any other judge. The other three judges, (b) however, could not adopt the sentiments of the Chief, with respect to this unimpeachable integrity of arbitrators; they supposed it possible, that they might be influenced by corrupt motives, and said, it was abominable to countenance them in such proceedings, and they ought to be punished for having abused the office of a judge. Accordingly an

(a) *Alardice v. Cambel* in the Exchequer. 1 Barnard. 75, 152. Bunb. 265.

(b) Powell, Powys and Gould.

application being made to have an award set aside, which had been made by arbitrators, chosen by the consent of parties, under a rule of *nisi prius*, which had afterwards been made a rule of the court of King's Bench, and affidavits being produced of the misconduct of the arbitrators, they were ordered to attend, and all their proceedings being examined, one (a) report of the case says, great misconduct appeared; but another (b) says the award was examined and confirmed; that the plaintiff moved for an attachment for non-performance; but that the court held that the non-performance, while the matter was under examination, was no contempt.

WHEN the submission is by reference at *nisi prius*, there is no time limited for making an application to set aside an award for any cause, whether for corruption or for an objection appearing on the face of the award; and the defendant has the same advantage in shewing cause against an attachment being granted on the application of the plaintiff. (c)

WHEN the submission is by consent to have it made a rule of court according to the statute, no application can be made to have the award set aside till the submission be actually made a rule of court; (d) but it is not necessary, as suggested in one book, (e) that the submission be made a rule of court before the award made; that may frequently be impossible, because the award may be made in the vacation, before any term arrives after the submission. (f)

By the words of the statute, however, the complaint must be made before the end of the next term after making the award; and it is said (g) that nothing is a ground within that statute for setting aside an award but the misconduct of the arbitrators: but as that statute was made to put awards made according to the directions of it, on the same footing with awards made in consequence of references at *nisi prius*, and is declaratory of what the

(a) *Morris v. Sir Richard Reynolds*. 2 Ld. Raym. 857.

(b) *S. C.* 1 Salk. 73.

(c) *Vid.* 2 Atk. 155, (162.) and a Dictum of Lord Macdlesfield's. 1 Barnard. 461. Str. 301. 2 Bur. 701.

(d) 1 Str. 301. 2 Vef. 317. 2 Str. 1178.

(e) 3 P. W. 362.

(f) *Vid.* 1 Barnard. 153.

(g) 1 Str. 301.

law was with respect to them, any other objection may be made to an award founded on a submission of the former kind, which might be made to one founded on a submission of the latter; (a) and where the objection arises on the face of the award, it may be made at any time, on shewing cause against an attachment, though it be after the time allowed by the statute for complaining against corruption. (b)

WHERE the submission is by consent under an order of a court of equity in a cause depending there, exceptions may be made to the award, as to a master's report. And when the party complaining of the award alleges that the arbitrators had not considered certain particulars, which were in issue in the cause, the court will order the arbitrators to certify whether they had considered them, and examine into the merits of the award; and if it be found unjust, performance will not be decreed, even though it be expressed in the order of reference, that the award to be made shall be final, and confirmed by a decree of the court without exception or appeal. (c)

THE most frequent subject of complaint *For what Causes an Award may be set aside.* against an award arises from some imputed misconduct of the arbitrators; and when the complaint is made out, it is generally successful. If the submission be to three, or any two of them, and two, by any undue means, exclude the third, that alone is sufficient to cause the award to be set aside. (d)

So, if the arbitrators hold private meetings with one of the parties, and admit him to be heard, to induce an alteration in their award, this is such gross partiality as to induce a court of equity to set it aside. (e)

WHERE an umpire was chosen by the arbitrators by throwing crosses and pyle, this was thought sufficient reason to set aside the umpirage. (f)

So, where the servant of the person chosen umpire had, before the award made, given out that he was sure his master would

(a) Vid. 2 Bur. 701.

(b) Barnes, 57. Id. 55 contra.

(c) 1 Ch. Ca. 186. 1 Vern. 469, 470; 2 Vern. 109. 1 Brown, 398.

(d) 2 Vern. 515.

(e) Id. ibid.

(f) Id. 485.

award 150l. and it appeared that the arbitrators had differed; the one consenting to give 35l. and the other insisting on 95l. and that the umpire coming in had given 150l. these circumstances the court considered as an evidence of fraud and corruption, and therefore decreed the arbitration bond to be given up. (a)

So, where the arbitrators promised to hear witnesses, but afterwards made their award without hearing any. (b) So, where they promised not to make their award 'till one of the parties who was not well, should come abroad, but they made it before. (c)

THERE were several stated accounts between the plaintiff and the defendant, by which considerable sums were due from the defendant to the plaintiff, but the arbitrator, without regarding any of these stated accounts, made up an account in his own way bringing in the plaintiff indebted to the defendant 25l. and intended to award the former to assign over to the latter a mortgage which he had on the other's estate, on which mutual releases were to be given. The plaintiff understanding what award the arbitrator was about to make, sent a messenger about two or three days before the time for making the award was expired, to inform him that the plaintiff desired him to defer making his award, until he should talk with him about his demands to support the stated accounts, and know what objections were made against them. The arbitrator, however, would not defer making his award. The Lord Chancellor, on a bill filed by the plaintiff to have the award set aside, said that it was acting unduly to proceed in making the award, when the plaintiff had desired to be heard against the arbitrators determining in contradiction to so many stated accounts. And though it was answered that the application from the plaintiff was within two or three days before the time for making the award was expired, and with an intent that no award should be made; and though it did not appear that the plaintiff was ready to be heard within the time, yet as there seemed to be just ground for the plaintiff to desire to be heard, and it was difficult to assign a reason for re-

(a) Id. 101.

(b) Id. 251.

(c) Id. *ibid.*

jecting so many stated accounts so recently allowed and passed between both the submitting parties, the court set aside the award with costs. (a) In the case of Ward before mentioned, Walker, one of the arbitrators, had said he would make Ward pay costs; Lord Macclesfield thought this such a declaration, that though Floyd, the other arbitrator, joined in the award, he decreed satisfaction to be acknowledged on the judgment on the bond of submission, and inverted Walker's threats by making *him* pay costs. (b)

LORD Hardwicke approved of this decree, and on the authority of it made a similar one in the case Chicot and Lequesne. There were three arbitrators, G. Vine, and Myhill: the award was made without the latter hearing it, or having an opportunity of conference to convince the others, or be convinced. It appeared in evidence, that at one of their meetings Vine saying he should consider and judge on plain facts, G. replied, he should not mind facts, that being convinced Mr. Letellier had misused the Lequesnes, and having it now in his power, he would mulct his representatives. Lord Hardwicke declared, that if these were words of warmth only, they were a declaration made by a person who was to act the part of a judge; and if he carried that heat and passion into execution, the award ought not to be suffered to stand. If it was the result of his judgment on the merits, it was a partial result; his Lordship therefore ordered that G. and M. should be examined on interrogatories before the master, Vine having been examined before; and if it should come out that G. did make that declaration, he would follow the precedent, and make him pay costs. (c)

ARBITRATORS had insisted on three guineas a piece to be paid them by each of the parties, before making their award, for their trouble and expences. The defendant refused to do it on his part, and the plaintiff paid the whole money. The court thought this a matter of so delicate a nature, and the example so dangerous, that they set aside the award on that account, because

(a) 3 P. W. 362. Spettigue v. Carpenter.

(b) 2 Vef. 317.

(c) 2 Vef. 216—218.

if it should be suffered, it would be hard to distinguish what was corruption. (*a*)

It has been thought that the circumstance of the arbitrator's employing the attorney, of the party in whose favour the award was made, to draw it up, was a proof of corruption: but there is no case to that purpose; nor does it at all appear a sufficient reason for setting aside an award: the arbitrator employs the party's attorney as his own: and if this objection were good, it is apprehended a great many awards might be set aside which are perfectly fair. (*b*)

If it appear that the arbitrators went on a plain mistake, either as to the law, or in a point of fact, that is an error appearing on the face of the award, and sufficient to set it aside. (*c*)

If indeed they appear to be mistaken in a doubtful point of law, the award may be permitted to stand, though the court, after great deliberation, should be of a different opinion. (*d*)

It is reported to have been said by Lord Hardwicke, that the arbitrators are not bound to give notice of the time when, and the particular place where they intend to meet, and that an objection of that kind is not material. (*e*) It is very difficult, however, to approve of the justice of his Lordship's observation.

If the arbitrators appear to have an interest in the subject of the reference, a court of equity will consider this as a sufficient ground for setting aside the award. Therefore, where it appeared that the award related to a cargo, in which the arbitrators were interested, and that five days after the award made, they attached the money awarded, for debts owing to them by the party in whose favour they had awarded, the court set aside the award, presuming that the arbitrators might have set too great a value on the cargo, from the interest they had in the subject. (*f*)

WHERE any circumstance is suppressed by either of the parties, or concealed from one of the arbitrators, and if the arbitra-

(*a*) B. R. H. 54. 2 Barnard. 463.

(*b*) Vid. 1 Barnard. 430.

(*c*) Corneforth v. Green. 2 Vern. 705, cited 3 Atk. 494, (462.)

(*d*) Dict. per Lord Hardwicke. 3 Atk. 495, (462.)

(*e*) 3 Atk. 497, (530.)

(*f*) 2 Vern. 251.

tor declare that had he known that circumstance he would not have made such an award, that will be a sufficient reason for setting aside the award. Thus where certain marriage articles were shewn only to one of the arbitrators, and the other after the award made declared that, had he seen the articles, he would not have consented to the award—Lord Hardwicke set the award aside. (a)

ON a submission at *nisi prius* of all matters in difference between the parties, the arbitrator, on settling all articles of account, found one of them indebted to the other in a sum of 50*l.* but that the party so indebted was security for the other in a bond; he therefore awarded that the party indebted should pay the 50*l.* but not until the other had either discharged the bond or indemnified the security against it. At the time of the reference the party indebted was in Ireland, and the matter was conducted on his behalf by his attorney, who was not acquainted with any other circumstance than those laid before the arbitrator; the party to whom the money was awarded indemnified the other against the bond or discharged it, and then brought an action for the 50*l.* holding the other to bail: it was then discovered that the defendant was bound as a security for the plaintiff, in another bond to a considerable amount; a circumstance which was within the plaintiff's knowledge at the time of the reference, but which he had concealed. The arbitrator now swore that had this circumstance of the other bond been laid before him, he would not have awarded the 50*l.* without providing that the plaintiff should either discharge the second bond, or indemnify the defendant against it. On these circumstances being stated to the court, they granted a rule to shew cause: but the event I have not heard. (b)

By the Roman law, the party who thought he had reason to complain of an award, might be relieved against it for reasons of the same nature with those which are the foundations of relief in our courts. (c)

WHERE

(a) 1 Atk. 77, (64.)

(b) M. 1790. B. R.

(c) Ita demum autem committitur stipulatio, cum adversus eam quid

fit, si sine dolo malo stipulantis factum est: sub hac enim conditione committitur stipulatio, ne quis doli sui præmium ferat. Sed siquidem compromisso

WHERE the submission is under the statute or by reference at *nisi prius*, the court will listen to an application to have the award sent back to the arbitrator to reconsider it, on the suggestion that he had not sufficient materials before him; and perhaps too, to rectify any trifling or apparent mistake: but when the submission is according to the statute, such application must be made, within the time thereby prescribed, though no misconduct be imputed to the arbitrator. (*a*)

IF an award appear on the face of it to be contrary to the rules of a court of equity, that will be a reason for such a court to set it aside; as if it concern an infant, to whom a sum of money is awarded; and it is also awarded that the guardian shall give a bond that the infant shall, at his full age, convey certain land in dispute: for this is inequitable, because the infant may die, or if he live to full age, may refuse to convey. (*b*)

ON a bill filed merely to set aside an award, the court will not permit the plaintiff to discuss any legal objections to the award itself, because advantage may be taken of these at law; but will restrict him to those for partiality and corruption: where the bill is for an account as well as to set aside the award, the plaintiff, in order to let in such account, may make legal objections. (*c*)

compromisso adjiciatur, *siquid dolo in ea re factum sit*; ex stipulatu conveniri, qui dolo fecit, potest. Et ideo, si arbitrum quis corrumpit vel pecunia, vel ambitione, vel advocatum diversæ partis, vel aliquem ex his quibus causam suam commiserat; vel si adversarium callide circumvenit. Et omnino si in hac lite dolose versatus est: locum habebit ex stipulatu actio. Et ideo, si velit de dolo actionem exercere adversarius: non debet cum habeat

ex stipulatu actionem. Quod si hujusmodi clausula in compromisso adscripta non est, tunc de dolo actio, vel exceptio locum habebit. Hoc autem compromissum plenum est, quod et doli clausulæ habet mentionem.—Ff. l. 4. t. 8. f. 31.

(*a*) 2 Term. Rep. 781.

(*b*) 1 Ca. Ch. 279, 280.

(*c*) *Champion v. Wenham*. Ambler, 245.

C H A P. VIII.

THE EFFECT OF THE AWARD IN PRECLUDING THE PARTIES FROM SUING ON THE ORIGINAL CAUSE OF ACTION, WHICH WAS THE SUBJECT OF THE REFERENCE.

AS the object of every reference to arbitrators, is to have an end put, by the decision of a domestic tribunal, to all controversy respecting the subject referred, no rule is more consonant to good sense than that which precludes the one party from harrassing the other with an action on the original subject of dispute. The ancient law, accordingly, provided a remedy by action for him who was so harrassed ; for as soon as he was sued on the original cause of action, he might sue out a special writ of trespass on the case, which is to be found in the Register, (a) by the name of *Breve de Arbitratione factâ*, on which he might recover damages for the vexation ; and it were good, says Lord Coke, that some one would sue that writ. (b) The wisdom of his Lordship's observation is, however, very questionable ; as the defendant has a much less expensive, and much more speedy remedy, in the privilege of pleading the award in bar of the plaintiff's action.

To what action an award may be pleaded in bar it is not necessary here to point out ; that question will be sufficiently answered by a perusal of the chapter on the subject of reference, (c) an award being pleadable in bar to every action brought on a question which may be referred to arbitration.

THE question, what award may be pleaded in bar admits in general of an answer equally short ; it must have all the qualities necessary to constitute a good award, and must be such, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance : but, if performance be alleged, a void award may frequently be a good bar. An award,

(a) Reg. Br. Orig. III. a.

(b) 3 Bulstr. 68, (66.)

(c) Cap. 3. page 30—40.

however,

however, which is in itself uncertain, and cannot be ascertained by averment, cannot be pleaded in bar.—To an action of assumpsit for work and labour done, the defendant pleaded an award “that the plaintiff should be satisfied for the days work and task work he had done for the defendant; but no value was put, by the arbitrator, on the work; and that then the plaintiff should pay to the defendant 25*l.* and give him a general release of all controversies:” the defendant then averred that the task work and days work were worth 12*l.* 10*s.* and no more, and that he had paid and satisfied the plaintiff that sum. But the plea was overruled, because the arbitrator himself had not valued the work. (*a*)

WHERE an award, it is said, creates a new duty, instead of that which was in controversy, the party has a remedy on the award, and therefore if he resort to an action on that which was referred, the award is a good bar to that action: but where the award does not create a new duty, but only extinguishes the old by release, the award is no bar to an action on the original demand. On this principle, where an action of assumpsit was brought on an agreement for the delivery of a certain quantity of hops, and the defendant pleaded a submission to arbitration, and an award that each should give to the other general releases, and shewing that he had always been ready, and still was, to sign and seal a release; this was held to be no bar, because nothing, it was said, was awarded in satisfaction. (*b*)

ON the same principle, it has been said, an award “that all suits shall cease,” though good to make the party forfeit his bond, if he proceed in the suit, yet is not a good plea to the original action, because it is a thing always executory and at the will of the parties, and there are no means at law to enforce the performance of it. (*c*) Both this and the case immediately preceding, however, seem altogether irreconcilable with good sense. What reason can be given, why an award should be

(*a*) Pope v. Brett. 2 Saund. 292.
2 Keb. 736. vid. 1 Keb. 754. Dudley v. Cole.

Raym. 248. 12 Mod. 130. Comb. 440. 1 Salk. 69.

(*b*) Freeman v. Bernard. 1 Ld.

(*c*) Lutw. 56, 57.

considered as good, for the purpose of making the party forfeit his bond by a breach of it, and yet that he should not be permitted to plead it in bar of an action for the original cause? While indeed it was held that no action could be maintained on an award to do a collateral thing, unless the submission was by bond, it was perfectly consistent with reason that such an award should be no bar to the original action, unless performance of it were shewn on the part of the defendant who pleaded it: the purpose of the submission was to decide, whether either of the parties was entitled to complain against the other, to give *him* a recompence, *to whom* the arbitrator thought it was due, and by that recompence to put an end to the disputes submitted: if therefore performance could not be compelled, it was reasonable, the plaintiff should not be precluded from prosecuting his action for the original complaint. But, after it came to be held that there was a remedy on an award of a collateral thing, though the submission was not by bond, it seems altogether inconceivable, why any case should be excepted, in which the award should not be a good plea. If the party, on an award that all suits shall cease, must forfeit his bond, by going on with his action, or where it is that he shall give a release, by not giving that release accordingly; or if, where the submission is verbal, an action may be maintained on the submission, for a breach in continuing the action, or not giving the release; why should not the award of the one or of the other be a good plea to an action for the original cause?

AN award, which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand. (a)

To an "indebitatus assumpsit," and "quantum meruit" for work done, and goods sold and delivered, the defendant pleaded an award, by which, it was ordered that the plaintiff, for the work done, should accept a bill of sale before made, of the eighth part of the ship "Fortune," or a like bill of sale to be made, and that the plaintiff and defendant should give each to the other a general; among other exceptions to this award as a plea, one was that, nothing being awarded for the goods sold and

(a) Farrer v. Bates. Al. 5.

and delivered, the award did not give a satisfaction for the *whole* demand; for that, according to a former case, the general release was not of itself a satisfaction. But had the bill of sale, it was said, been awarded in full of all demands, then the award would have been a good plea to the whole, because it would have been in satisfaction of all demands. (*a*)

WHERE the plaintiff lays several counts in his declaration, and the award, from the terms of it, can only be a bar to one of them; if, in reality, they are all for the same cause, the best way of pleading seems to be, to plead the award to that count, to which, in terms, it is an answer, and the general issue to the rest. Thus, in the last case, the award might have been pleaded to the count for work and labour, and the general issue to that for the goods sold and delivered. (*b*)

IN an action of account the plaintiffs declared against the defendant, as bailiff, charging him with several parcels of goods, which he had received for merchandizing: the defendant pleaded that the plaintiffs and he had submitted to arbitrators, with a submission over to an umpire; that the arbitrators made no award; but that the umpire had awarded that all suits should cease; that the plaintiffs should pay the defendant 30*l.* and should receive their goods left in the hands of one Warren for their use; that if one of the plaintiffs should, within four months after the date of the award, make oath that he had discharged two tons freight at 16*l.* per ton, then the defendant should have no more money than the 30*l.* unless, within ten days after the four months, he should make oath that he took the two tons only at 10*l.* per ton; and then the plaintiffs, or some of them, should pay him 12*l.* more; and lastly, that the parties should give mutual releases. The plaintiffs demurred, and the defendant joined in demurrer. The Chief Justice (*c*) pronounced judgment in favour of the plaintiffs, but without stating his reasons; but the reporter (*d*) has thought proper to give us his own argument in

(*a*) Clapcott v. Davy. 1 *Ld.*
Raym. 612.
(*b*) Sem. *Ld.* Raym. *ibid.*

(*c*) Treby.
(*d*) Lutwyche.

favour of the plaintiffs. It was acknowledged, he says, that as to the ceasing of all suits, and the giving of mutual releases, the award was good to bind the parties to performance; but it was insisted, that, had nothing else been awarded, the award for these would not alone have been a sufficient plea: it was also objected that the part which related to the two tons' freight was apparently absurd and unreasonable, and that therefore the award in that particular was void. But the principal objection was to that part which directed the plaintiffs to receive the goods which had been left in the hands of Warren for their use: this was evidently meant as an equivalent to them for the payment of the 30*l.* and if there was any foundation for what was alledged on this head, that the execution depended on the mere good will of the defendant, because Warren might not deliver the goods without his order, and the law gave no remedy to compel the delivery of them, or to procure satisfaction for the non-delivery, undoubtedly the award ought not to have been a bar to the action of account; because, as was justly observed, all the things awarded to be done in favour of the plaintiffs were but one intire and complete satisfaction for their demand: but, if, in truth, the award, "that the plaintiff should receive the goods," ought to have been construed that the defendant should deliver them, or procure them to be delivered, and if an action on the award in which the breach might have been assigned in the non-delivery, could have been maintained against the defendant, there seems to have been no good reason for the judgment. (a)

A DEFENDANT, to an action of trespass, may sometimes plead an award made on submission by the plaintiff and a stranger. Thus, to an action of trespass for trampling down the plaintiff's grass with cattle, the defendant pleaded that at the time of the trespass committed, the cattle were in the custody of a stranger, and that the plaintiff and that stranger had submitted to the award of a certain person, who ordered the stranger to pay the plaintiff a certain sum, in satisfaction of the trespass, which

(a) *Dighton et al. v. Whiting.* Lutw. 51.

which he had accordingly done; and this was held to be a good bar to the action. (a)

THE defendant may also plead that the trespass, of which the plaintiff complains, was committed by the defendant and another; and that the matter was afterwards submitted to arbitration, by the plaintiff, the defendant and the other trespasser.

THE plaintiff declared in trespass for taking away and detaining his wife for four months against his consent, by which he lost the comforts of matrimony: the defendant, after imparlance, pleaded, as to the force and arms, not guilty, and as to the residue, that the trespass of which the plaintiff complained, was committed as well by the defendant as by one H. Martin, and that after the trespass aforesaid, and since the last continuance, particularizing the day, the plaintiff, the defendant and H. Martin, submitted to the arbitration of three persons the trespass aforesaid, between the plaintiff, and the same defendant and H. Martin, and divers suits then depending between them: that the arbitrators had awarded that the defendant and H. Martin should pay to the plaintiff, or tender to his use, 7l. on the third of June, and two intire third parts of all the costs of the plaintiff, in and about the said suit, payable to his attorney, after the bill produced; that they had tendered the 7l. on the third of June, but the plaintiff had refused it, and that no bill of the costs had hitherto been produced. On demurrer, this was held a good plea, though it was objected that the declaration had charged the defendant for a particular fact of his own, namely, the taking away of the plaintiff's wife and the detention of her for four months; that the detainer by the defendant could not be committed by H. Martin, and therefore the suit against the defendant for that fact could not be a suit depending between the plaintiff and the defendant and H. Martin: but the objection was overruled, for this reason, that the submission was to be construed of all actions between them or any of them. (b)

To an action brought after the submission, and before the

(a) 7 H. 4. 31. b. Brooke, 44. b. |
pl. 48. Rol. Arb. 2 B. 1.

(b) Thomlinson v. Arriskin. Co-
myns, 328.

award made, the defendant may plead that submission, and that the arbitrators have not yet made any award; provided no day be limited for the making of it: but if a day be limited, then he can only have the benefit of this plea, before that day. (*a*)

BUT in order to make an award a good plea, it must appear that the plaintiff and the defendant were equally bound by it. To an action of trespass against C. P. he pleaded that the plaintiff had formerly brought another action against the present defendant and one J. P. on which the plaintiff and the said J. P. had submitted all manner of trespasses and actions between them, and also all other trespasses committed between the plaintiff and the present defendant; that the arbitrators awarded, that as well for the trespass of the present defendant as that of J. P. there should be paid to the plaintiff 100*l.* which had been paid: it was held that this was not good, pleaded as an award, because there was no submission of the defendant, and therefore he was not bound by it: but it was held that it would have been a bar to the action, if pleaded as an agreement of the plaintiff. (*b*)

IN pleading an award, the defendant, it is said, must shew the place where the submission was made, and the names of the arbitrators, but that it is not necessary, in averring the payment of money in pursuance of an award, to state at what place nor at what time it was paid; (*c*) nor at what time the award was made. (*d*) A difference is made in the old books, in the manner of pleading an award in a declaration, and in a plea.—In the first case, the plaintiff must shew for what cause they submitted, but in the second, it is sufficient for the defendant to alledge the submission generally. (*e*) But it seems at least necessary that it should appear by the plea, that the submission comprehended the subject on which the action is brought, otherwise it can be no plea to that action.

THERE were formerly some distinctions in the manner of pleading an award, with respect to the necessity of alledging per-

(*a*) 13 R. 2.

(*b*) 20 H. 6. 41. Fhbt. 51. b.

(*c*) 8 H. 6. 25. b. 9 H. 6. 5. Bpooke, 44. a.

(*d*) Per Briggs, 21 E. 4. 41. b. ad quod non fuit responsum.

(*e*) Br. 34. cites 5 E. 4. 1.

formance of the things awarded, which though, of importance then, are not now essential.

THE most general distinction, was between the case where the party in whose favour the award was made, had a remedy to compel performance, and that where he had not. In the former the award itself was considered as a sufficient answer to an action on the subject submitted; but in the latter, it was necessary that he should also shew performance on his part; (*a*) because it was considered that if there was no remedy for the thing awarded, it remained in the power of the defendant whether he would satisfy the plaintiff or not. (*b*)

THERE was however one exception from this case, which was, that, when the thing, awarded to be done on the part of the defendant, was to follow the performance of something on the part of the plaintiff, it was sufficient for the defendant to alledge a default on the plaintiff's part, and to say that on performance by him, he was ready to perform his part. (*c*)

THIS distinction principally prevailed between the cases of a verbal submission, and a submission by bond. In the latter the plaintiff had always the means of compelling performance of the award, by suing for the penalty of the bond: but in the former, unless the award was for the payment of money, the plaintiff had no remedy on the award, and, therefore, it was reasonable that the defendant in pleading the award and submission should shew performance. (*d*)

IN the case of an award for the payment of money on a parol submission, there was also a difference in the manner of pleading, when the money was ordered to be paid on a particular day, and when there was no time limited for the payment.

IN the latter case it was necessary for the defendant to alledge at least that he always had been, and still was ready to pay; and

(*a*) 43 E. 3. 33. 45 E. 3. 16. b.
13 H. 4. 12. 9 H. 6. 50. b. 19 H.
6. 36. 9 E. 4. 44. Fhbt. 52. b.
Br. 45. a. Rol. Arb. X. 3. 6.
(*b*) 6 Mod. 221.

(*c*) 20 H. 6. 18. 19. Br. 44. a.
36 H. 6. 15. Brooke Arb. pl. 28.
(*d*) 9 E. 4. 44. Vid. 1 Ld. Raym.
248.

there are some cases reported, from which it might be concluded that an allegation of actual payment was necessary; but that seems to have been carrying the point too far, because the plaintiff might at any time have had his remedy on the award. (*a*)

WHERE the award was for the payment of money at a certain day; in pleading this award, it was sufficient to alledge that the day was not come. (*b*) But even in this case, if the day was past, he must have shewn that on or before the day he had paid the money, or that he had tendered, but that the plaintiff had refused it; for, it was said, though the plaintiff might have debt on the award, yet the defendant could not compel the plaintiff to have recourse to that action, and be barred of his action for the original cause: it was his own default that he had not paid the money at the time appointed. (*c*)

BUT these distinctions hardly any longer exist; for since it has been held that an action will lie on the mere submission, it is in no case necessary for the defendant, in pleading an award in bar of an action, to alledge performance of the thing awarded, unless where the award is void, and consequently the plaintiff could not enforce it. (*d*)

SUCH is the general System of the Law of Awards; a system which, in many instances, with much difficulty purified from the unintelligible jargon of technical argumentation, has been, in modern times, established on the principles of sober reason and sound sense; a system, which, were the parties submitting always certain of appealing to a judge of perfect wisdom and incorruptible integrity, would be highly beneficial to the society: but which, from the weakness and depravity of men, frequently becomes the instrument of the most flagrant injustice, and the most serious

(*a*) Vid. the places before cited.

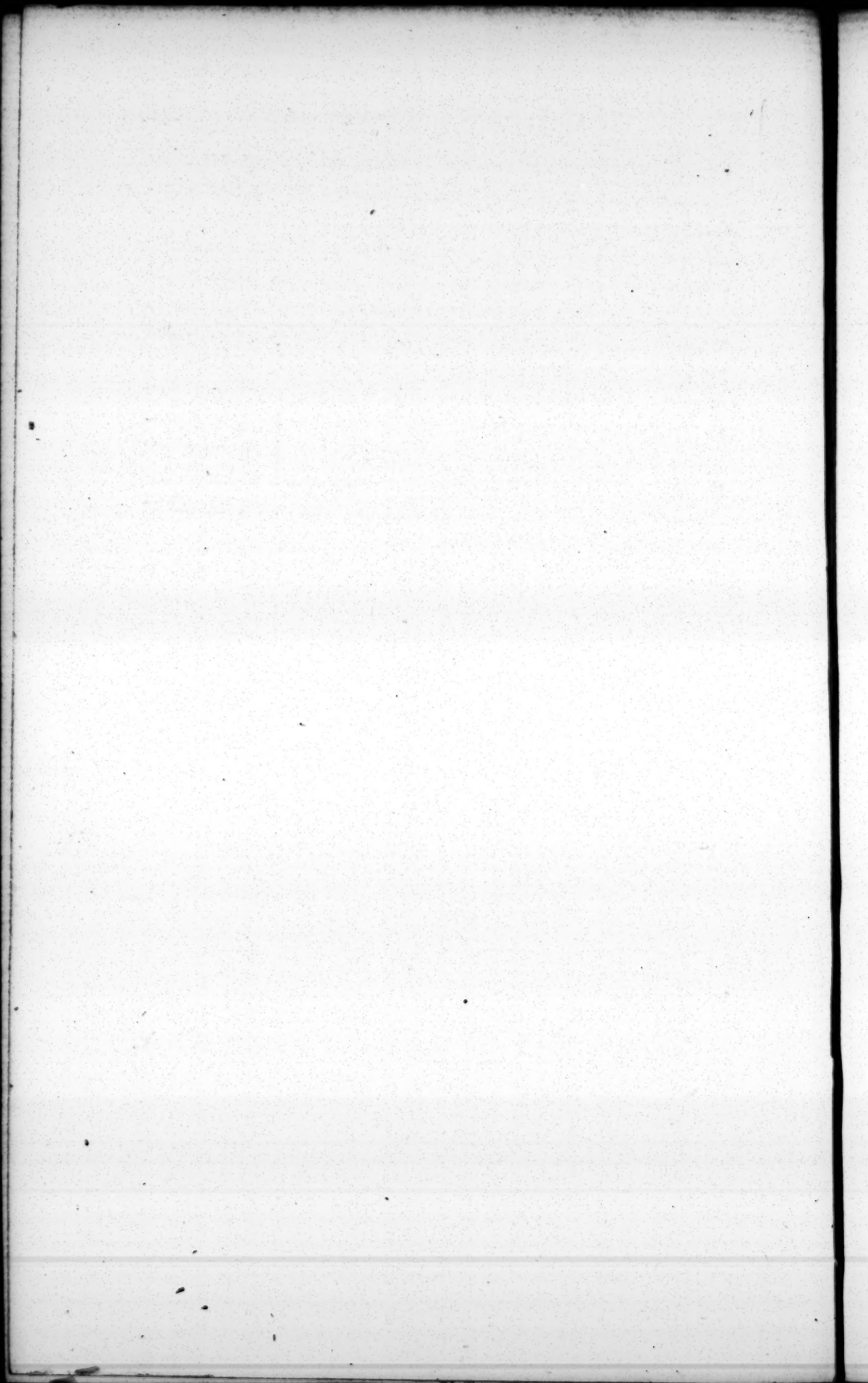
(*b*) 22 H. 6. 52. b. 5 E. 4. 7.
 Rol. Arb. Z. 3. 46 E. 3. 17. b.
 Rol. Arb. X. 5.

(*c*) 49 E. 3. 3. 21 E. 4. 42. b.

Rol. Arb. Z. 1. 1 Keb. 848. Vid. all these distinctions pointed out, Lutw. 281, Ruffel v. Williams.

(*d*) Vid. 1 Ld. Raym. 122.

oppression. From the manner in which arbitrations are often conducted, the parties, instead of obtaining a speedy determination to their disputes at an easy expence, are frequently altogether disappointed, by having no determination at all, and frequently involved in a most expensive and tedious litigation, which might have been avoided, had they chosen at first to have recourse to the ordinary tribunals of the country. The only subjects, which are proper for arbitration, seem to be long and intricate accounts; disputes of so trifling a nature, that it is of little importance to the parties in whose favour the decision may be given, provided, at all events, there be a decision; and questions on which the evidence is so uncertain, that it is much better to have a decision, whether right or wrong, than that the parties should be involved in continued litigation.



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In pa. 6, note (c), second column, l. second, *for stari, read stare.*

14, note (a), *for Compton, read Crompton.*

18, at the bottom, *after plaintiff, supply (c).*

19, note (a), first column, last l. *for stari, read stare.*

20, l. 6, *after hindered them, supply from.*

38, note (a), last l. first column, *for parti, read parte.*

41, note (d), l. fourth, *for opitimæ, read optimæ.*

48, l. 26, *for on before, read on or before.*

49, l. 27, *for the opinion, read this opinion.*

51, l. 2, *for first, read last.*

59, l. 20, *for reference, read referee.*

62, l. 7, *for owing, read owen.*

67, note, second column, l. first, *for stari, read stare.*

———— l. eighth, *for summmum, read summam.*

74, note (b), *for delt, read debt.*

76, note (b), first column, l. four, *for sentiffie, read sensiffie.*

82, l. 8, *for said, read fide.*

95, l. 8, *for "demand," read "demands."*

119, l. 5, *for may, read many.*

148, l. 26, *for of the case, read of that.*

151, l. 9, *between free and suits, supply from.*

—— note (c), *after Harris, supply Cro. El. 904.*

160, l. 2, *after recited, supply it.*

203, l. 15, *for cause, read case.*

214, l. 25, *for uot, read not.*

226, l. 6, *dole mere.*

238, l. 11, *after case, supply of.*

* * There are several inaccuracies in the punctuation, which the candid reader will observe and excuse.

*No. 4, Hare-Court, Temple,
April 20, 1791.*